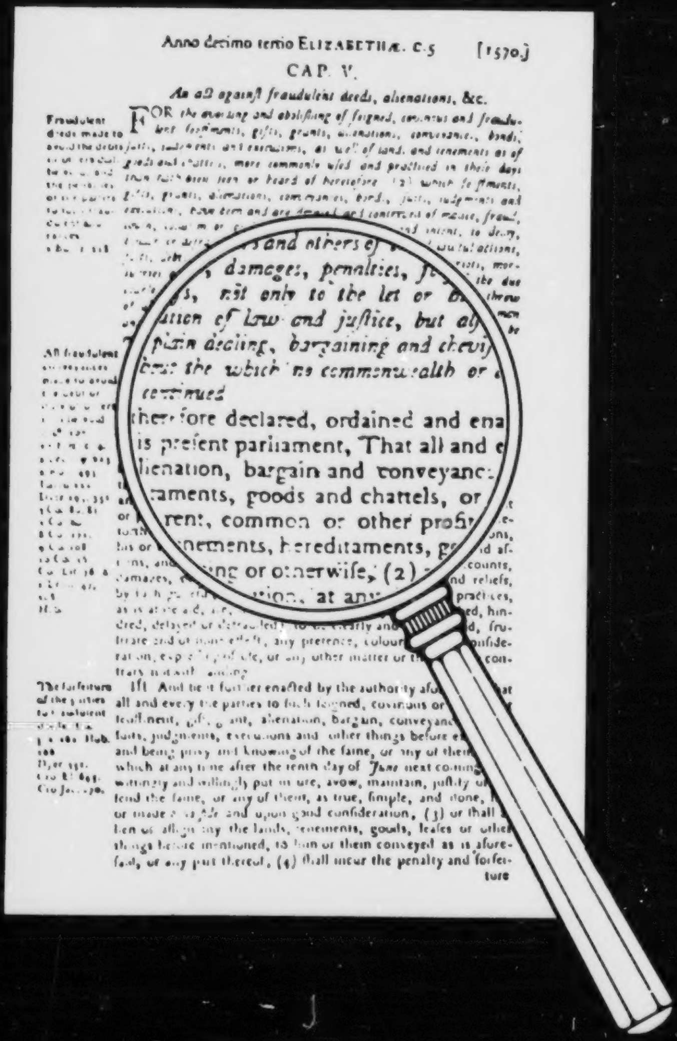
Law Reform
Commission of
Saskatchewan

THE STATUS OF ENGLISH STATUTE LAW IN SASKATCHEWAN

Saskatchewan



Anno decimo tertio ELIZABETHÆ. c. 5 [1570.]

CAP. V.

An act against fraudulent deeds, alienations, &c.

THE STATUS OF
ENGLISH STATUTE LAW
IN SASKATCHEWAN

Law Reform Commission of Saskatchewan

Saskatoon, Saskatchewan

February 1990

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The Law Reform Commission of Saskatchewan was established by ***An Act to Establish a Law Reform Commission*** proclaimed in November, 1973, and began functioning in February of 1974.

The Commissioners are:

Mr. Dale G. Linn, B.A., LL.B., Chairman

Madam Justice Marjorie A. Gerwing

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* * * * * * * * * * * * * * *

The Law Reform Commission Act

> 6. The Commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law....

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TABLE OF CONTENTS

PREFACE i

INTRODUCTION 1

1. The Doctrine of Reception 1
2. The Status of English Law in Saskatchewan 4
3. Received Law and Law Reform 7

PART I - PRINCIPLES

CHAPTER 1 - ENGLISH LAW IN SASKATCHEWAN: THE HISTORICAL BACKGROUND 14

1. The Effect of the Northwest Territories Act 14
2. Historical Background 18

Appendix 26

CHAPTER 2 - THE PRINCIPLES OF RECEPTION 29

1. Introduction 29
2. Imperial Acts in Force Proprio Vigore 30
3. Received Law 35
    (i) The Test of Applicability 35
    (ii) Amendment and Repeal of Received Law 43

PART II - STATUTES CONSIDERED

CHAPTER 1 - REAL PROPERTY STATUTES 50

1. Introduction 50
2. Foundation Statutes 54
    (i) Quia Emptores and Feudalism 55
    (ii) The Statute of Uses and the Decline of Feudalism 56
    (iii) Nineteenth Century Reform: Abolition of Archaic Actions 63
    (iv) Nineteenth Century Reform: Conveyancing 69
3. Statutes Frequently Applied 74
    (i) Co-tenancy and Partition 74
    (ii) Foreclosure and Sale 78
    (iii) Sale of Land by Auction 80

4. Other Statutes 81
  (i) Legislation to Prevent Frauds in Conveyancing 81
  (ii) Legislation Relating to Remainders and Reversions 83

Summary - Status of Legislation Considered 86

CHAPTER 2 - LANDLORD AND TENANT 88

1. Background 88
2. Received Law in Force 91
  (i) The Statute of Marlbridge 91
  (ii) Apportionment 93
  (iii) The Landlord and Tenant Act, 1709 94
  (iv) The Landlord and Tenant Act, 1851 94
  (v) The Distress for Rents Act, 1737 96

Summary - Status of Legislation Considered 99

CHAPTER 3 - WILLS, ESTATES AND TRUSTS 101

1. Wills and Intestate Succession 101
  (i) Wills 101
  (ii) Devolution of Real Property 104
  (iii) Rules of Succession 105
2. Probate and Administration 106
  (i) The Court of Probate Act, 1857 108
  (ii) The Administration of Estates Act, 1798 109
  (iii) The Court of Probate Act, 1858 112
  (iv) Miscellaneous Provisions Relating to Probate and Administration 116
  (v) Priority of Right to Administer 120
  (vi) Resealing Letters Probate 123
3. Trusts 124
  (i) Trustee Legislation 128
  (ii) Settlements 129
4. Related Legislation 131
  (i) The Definition of Charity 131
  (ii) Accumulations 132
  (iii) Powers of Appointment 133

Summary - Status of Legislation Considered 136

CHAPTER 4 - COMMERCIAL LAW 138

1. Background 138
2. Fraudulent Conveyances and the Statute of Frauds 146
  (i) Fraudulent Conveyances 146
  (ii) Statute of Frauds 151

3. Miscellaneous Nineteenth Century Statutes.......................... 154
  (i) The Mercantile Law Amendment Act................................. 154
  (ii) Bills of Lading.. 156

Summary - Status of Legislation Considered.............................. 158

CHAPTER 5 - TORT LAW.. 160

1. Background... 160
2. Statutes That May Remain In Force.................................... 163
  (i) The Fires Prevention Act... 163
  (ii) Liability of Constables and Justices............................ 164
  (iii) The Offences Against the Person Act........................... 167
  (iv) Maintenance and Champerty....................................... 170

Summary - Status of Legislation Considered.............................. 175

CHAPTER 6 - EVIDENCE.. 176

1. The English Background... 176
  (i) Competency of Witnesses.. 178
  (ii) Documentary Evidence... 179
  (iii) Other Statutory Reforms.. 181
2. The Effect of Saskatchewan Legislation............................... 182
3. English Legislation in Force... 185
  (i) Foreign Documents.. 185
  (ii) Evidence Tending to Show Adultery............................... 186
  (iii) Attesting Witnesses.. 190

Summary - Status of Legislation Considered.............................. 192

CHAPTER 7 - STATUTORY OFFENCES AND PENAL LAW............................ 193

1. Introduction... 193
2. Statutes Considered.. 194
  (i) Forcible Entry 194
  (ii) Breach of the Peace... 196
  (iii) Forfeiture... 200
  (iv) Gambling.. 204
  (v) Sunday Observance.. 208
  (vi) Sale of Offices Act... 210

Summary - Status of Legislation Considered.............................. 212

CHAPTER 8 - PROCEDURE.. 213

1. Background.. 213
2. Procedural Statutes Considered............................... 221
    - (i) Set-Off.. 221
    - (ii) Costs... 223
    - (iii) Costs in Crown Suits................................... 226
    - (iv) In Forma Pauperis...................................... 226

Summary - Status of Legislation Considered........................ 229

CHAPTER 9 - THE PREROGATIVE WRITS.. 230

1. Introduction.. 230
2. Habeas Corpus.. 231
3. Mandamus... 234
4. Quo Warranto... 237
5. Prohibition and Certiorari................................... 241

Summary - Status of Legislation Considered........................ 246

CHAPTER 10 - OTHER STATUTES.. 247

1. Limitation of Actions.. 247
2. Corporation Law.. 250
3. Family Law... 252
    - (i) The Divorce and Matrimonial Causes Act................. 252
    - (ii) Custody and Maintenance of Children.................... 256
    - (iii) Marriage... 260
4. Barristers and Solicitors.................................... 262
    - (i) Solicitor's Liens....................................... 263
    - (ii) Contingency Fees and Contracts for Fees................ 265
5. Constitutional Statutes...................................... 269
6. Other.. 273
    - (i) The Calendar (New Style) Act, 1750..................... 273
    - (ii) Conflict of Laws....................................... 274
    - (iii) The Truck Act.. 276
    - (iv) Expropriation: Injurious Affection..................... 278
    - (v) The Life Assurance Act, 1774............................ 285
    - (vi) Replevin Bonds... 287
    - (vii) Mental Incompetence.................................... 288
    - (viii) Interpretation of Statutes............................ 290

Summary - Status of Legislation Considered........................ 292

APPENDIX - Disposing of English Statute Law: Proposals.................. 295

TABLE OF ENGLISH STATUTES.. 316

PREFACE

When the Canadian constitution was patriated, the last vestige of colonial ties between Canada and the United Kingdom was cut. It would probably surprise most Canadians to learn that despite the *Constitution Act*, 1982 and more than a century of self-government, a large part of the statute law of England adopted before independent legislatures were established in Canada remains part of our law, enjoying the same status as if it had been enacted by our own law makers.

The *Northwest Territories Act*, 1886 established July 15, 1870 as the "reception date" for English law in the Territories which subsequently became the province of Saskatchewan. English statutes adopted before that date remain part of the law of the province, unless modified by the Saskatchewan legislature. Much of the received law has been repealed in Saskatchewan, either directly or by implication, over the course of a century of legislative activity. Some of the received law, however, remains vitally important; it includes statutes that are routinely applied by lawyers and courts in the province.

The doctrine of reception was convenient, perhaps essential, in 1886. Local legislators would have found it almost impossible to create the basic requisites of a functioning legal system without the doctrine. But with the passage of time, the utility of the received law has declined. It is time to cut this umbilical cord with the source of our legal traditions.

Increasingly, the doctrine of reception is an archaism; a source of inconvenience and confusion. It is often difficult to determine precisely what part of English statute law adopted before 1870 remains in force in the province, or to determine how it should be applied to contemporary legal matters.

Disposing of English statute law is not simple and straight forward, however. The received law has worked its way into the interstices of our legal system in complex and innumerable ways. Simply to declare English statutes no longer in force *en masse* would have unpredictable and unsettling consequences. Prior to the publication of this report, there was not even a reasonably comprehensive list of the received law in force in Saskatchewan (or in any other Canadian province). Identification of the law that can be regarded as in force was itself a major research project, breaking new ground in Canada. Once the received law had been identified, it was necessary to make decisions about what part of it should be retained, and how it could best be reincorporated into Saskatchewan law.

This report provides a map for the task of disposing of received statute law. The main body of the report discusses the problem of reception, and attempts to identify the living portion of English statute law in the province of Saskatchewan. An appendix makes proposals for re-enactment of some fifty English statutes, or parts of statutes, as Saskatchewan legislation.

Because of the broad scope of the research required in the preparation of this report, the Commission is particularly indebted to the members of the Bar who reviewed draft versions of this report, or portions of the report relating to areas of the law within their expertise. In particular, the Commission extends its thanks to Mr. Justice J.E. Cote, Mr. John Moss, Q.C., Mr. George Taylor, Q.C., Dean Peter MacKinnon, Professor Ronald Cuming, Q.C., Professor Roger Carter, Q.C., and Professor Don Purich. In addition, the Commission is indebted to assistance received from the British Columbia Law Reform Commission and the New Zealand Law Commission.

DALE G. LINN

CHAIRMAN

INTRODUCTION

> If an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force.
>
> \- Blackstone[1]

> Nothing is more difficult than to know which or our laws is to be regarded as imported into our colonies... Who is to decide whether they are adopted or not?
>
> \- Lord Cranworth[2]

1. THE DOCTRINE OF RECEPTION

It must have seemed entirely natural to the first English colonists in what is now Canada to assume that they took their law with them to the New World. Not only was that law their "birthright", as Blackstone put it; English law provided a foundation upon which the local legal system could develop.[3] The doctrine of reception was not primarily a manifestation of Imperial authority over the colonies. It was a doctrine of necessity and convenience in new territories with no legal system of their own.[4] While the Parliament of Westminster did occasionally legislate directly for the colonies,[5] the law introduced by the doctrine of reception was not otherwise added to by Britain after reception date. It was left to local legislators to make use of the law as they saw fit, amending it, modifying it, or repealing it as though it had been adopted by the local legislature itself. Because of its status as the foundation for future development, the received law has remained part of the law of former British colonies. Neither Westminster's abrogation of the right to legislate for the Dominions by the *Statute of Westminster* in 1931, nor patriation of the Constitution in 1982[6], altered the status of received law. It is hardly surprising that even the American courts quickly concluded that the English law

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[1] 1 Bl. Com., 107.

[2] *Whicker v. Hume* (1858), 7 H.L.C. 124, 11 E.R. 50.

[3] The common law doctrine of reception applied only to "colonies of settlement". The "ancient laws" of "colonies of conquest" remained in force "unless such as are against the law of God" (Bl. Com., *supra*, note 1, at 107). In Canada, only Quebec was classified as a colony of conquest, and it received English law in part by statute, see below p. 26. Blackstone himself noted that in fact the colonies of settlement in North America were obtained by "driving out the natives, with what natural justice I shall not at present inquire" (*Ibid.*, at 107). The different treatment of colonies of conquest underlines the

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proposition that the doctrine of reception was designed to provide the foundation for a local legal system, since it was not applied where suitable local law was already in force.

[4] This formulation of the reception doctrine, never clearly stated by the English authorities, was better appreciated in the colonies. Thomas Chandler Haliburton, the Nova Scotia jurist and humorist, expressed the opinion that "in the early settlement of a colony, when the local legislature has been just called into existence, and has its attention engrossed by the immediate wants of the members of the infant community in their new situation; the courts of judicature would naturally look for guidance...to the general laws of the mother country". (*Uniacke v. Dickson* (1848), 20 N.S.R. 287). For a modern analysis of the reception question in similar terms, see Joan Snade Marshall, *The Reception of Law as a Modern Legal Problem*, unpublished LL.M. Thesis, University of British Columbia, 1977.

[5] See below, pp. 30-35

[6] *Statute of Westminster*, 1931, 22 Geo. 5, c. 4; *Constitution Act*, 1982.

received by the 13 colonies remained in force after the American Revolution.[7]

The formal reception date for what is now Saskatchewan was established by the Canadian Parliament after the Northwest Territories became part of Canada. Section 11 of *The Northwest Territories Act*, 1886 provided that:

> Subject to the provisions of this Act, the laws of England relating to civil and criminal matters, as they existed on the 15th day of July, in the year of our Lord One Thousand, Eight Hundred and Seventy, shall be in force in the Territories, insofar as the same have not been or are not hereafter repealed, altered, varied, modified or affected by an Act of the Parliament of the United Kingdom applicable to the Territories or the Parliament of Canada or by an ordinance of the Lieutenant Governor in Council, or of the Legislative Assembly.[8]

This provision was re-enacted in the *Saskatchewan Act*, 1905 when the province was organized.[9]

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[7] 15 Am. Jur. (2nd) 605. That English law survived the Revolution appears to have been recognized as early as *Republica v. Mesca* 1 Dallas (U.S.) 73, (1789). See also James Wilson, *Lectures on Law* (delivered at the College of Philadelphia, 1790 and 1791), Part I, Chapter XII. The status of English statute law in the United States is, however, somewhat different than in Canada. In *Manoukian v. Tomasain*, 237 F. (2nd) 211, it was held:

> British statutes antedating the Declaration of Independence have almost universally been regarded as having the effect of judicial precedent, rather than legislative enactment, and are applied by American courts like the common law, rather than like enactments of American legislatures.

[8] R.S.C. 1886, c. 50, s. 11.

[9] S.C. 1905, c. 42, s. 16.

2. THE STATUS OF ENGLISH LAW IN SASKATCHEWAN

Both the common law and statute law received in 1870 have been significantly modified over the course of a century of legislative activity. Much of the received statute law has been superseded by Saskatchewan legislation. Some of it has been virtually forgotten for lack of use. But some statutes, such as the *Statute of Frauds*, 1677[10] and the *Partition Act*, 1868[11] remain vital parts of the law of Saskatchewan, frequently applied in our courts.

Saskatchewan courts have had little difficulty determining whether a common law rule remains part of the living law of the province. The difficulty in applying the reception doctrine identified by Lord Cranworth has been more acute in regard to statute law. Doubt surrounds almost every issue involved in the continued application of English statute law in Saskatchewan.

Part of the uncertainty about application of English statute law has to do with determining which statutes were actually received. *The Northwest Territories Act* provided that reception occurred only to the extent that English statutes "are applicable to the Territories". Until a statute has been considered by the courts, its status is necessarily uncertain, but that does not mean that it is irrelevant. For example, there are provisions in the English *Solicitors Act*, 1870 that would significantly alter the way in which lawyers bill their clients if found to be in force in Saskatchewan.[12] The fact that the legislation has never been considered in a Saskatchewan decision nor treated in practice as a statute in force does not alter its status. It has been found to be in force in the Yukon;[13] it may yet be found in force in Saskatchewan.

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[10] 1677, 29 Cha. 2, c. 3.

[11] 1868, 31 & 32 Vict., c. 40.

Even if a particular statute has been considered by the courts, its status may remain unclear. Consider, for example, *The Offences Against the Person Act*, 1861.[14] As recently as 1971, it was held to be in force in British Columbia; however, a Queen's Bench decision in Saskatchewan in 1979 held that it is not in force in this province.[15]

Questions may also arise about the relationship between a received statute and subsequent Saskatchewan legislation. It might seem reasonable to suppose that when Saskatchewan legislation occupies a field of legislative activity in a fairly comprehensive fashion, a received statute in the same field would cease to be in force. But that is not necessarily the case. The Saskatchewan *Trustee Act*,[16] for example, covers much the same subject matter as a series of 19th century English statutes. The Saskatchewan Act is, in fact, modelled on the

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[12] 1870, 33 & 34 Vict., c. 28.

[13] See below, pp. 265-268.

[14] 1861, 24 & 25 Vict., c. 100.

[15] See below, pp. 167-170.

[16] R.S.S. 1978, c. T-23.

English *Trustee Act*, 1893,[17] which replaced earlier legislation. But the 1893 Act was not identical to the legislation received as part of the law of Saskatchewan in 1886. In Manitoba it has been held that provincial trustee legislation is to be read cumulatively with the received statutes;[18] a similar conclusion may apply in Saskatchewan. There are almost certainly other examples of English statutes that remain in force despite comprehensive local legislation in the same field.

The policy embodied in an English statute unexpectedly found to be in force may be seriously out of step with policy considerations that would gain assent in the 1980's. Consider, for example, section 3 of the *Evidence Further Amendment Act*, 1869.[19] The Act established a rule of evidence absolving witnesses from answering questions tending to show adultery. The substance of the provision was incorporated into a Saskatchewan rule of court. In 1981, the rule was repealed and replaced with a new rule requiring witnesses to answer questions tending to show commission of adultery in certain circumstances. Because a rule of court cannot be valid if it conflicts with a statutory provision, it is likely that the new rule is invalid.[20] The virtually hidden statutory roots of this rule of evidence may have thwarted the efforts of the Rules Committee to modernize the law.

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[17] 1893, 56 & 57 Vict., c. 53.

[18] See below, p. 129.

[19] 1869, 32 & 33 Vict., c. 68.

[20] See below, pp. 186-190.

3. RECEIVED LAW AND LAW REFORM

Any useful appraisal of the status of English statute law must be pragmatic. Some 15,000 statutes were passed by the English Parliament between *Magna Carta*, 1225[21] and reception date; fewer than 100 have been reviewed by Saskatchewan courts. The rules applied by the courts to determine whether an English statute was reviewed are loose enough to make it conceivable that almost any of the 15,000 statutes passed before 1870 could be found to be in force. Attention must be focused, therefore, on those statutes which have the greatest claim, on both theoretical and practical grounds, to be in force. Even a cursory examination of the statute books makes it possible to quickly eliminate the majority of statutes passed before reception date as improbable candidates for reception.[22] But those that remain include more than a few hard cases. What is most important, however, is to identify those statutes that remain part of the living law of the Province. It is not always possible to do more than speculate about whether a particular statute is in force, but it is possible to make reasonable judgments about whether a statute contains principles that are still relevant to the Province's legal system.

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[21] *Magna Carta*, 9 H.3 (Ruff.), recorded in the Statutes of the Realm as 25 Ed. 1, was the fourth version of the Great Charter, originally adopted in 1215. It is conventionally "reckoned as the beginning of English statute law". There were earlier statutes, but they "worked themselves into the common law" (F.A. Maitland, *The Constitutional History of England*, Cambridge, 1919, p. 16.).

Editions of the early statutes are not entirely consistent. While Ruffhead's Statutes (prepared by Runnington in 1786) begins in 1225, the Statutes of the Realm (prepared by the Record Commissioners) begins with the *Statute of Merton*, 1235, 20 Hen. 3. Unless otherwise indicated, citations in this report follow the Chronological Table of the Statutes published annually since 1870 by the Royal Stationary Office. The Table follows the Statutes of the Realm to 13 Ann. (as far as that edition extended), and Ruffhead to 25 Geo. 3. After that date, all editions appear to be identical.

In the century since adoption of the *Northwest Territories Act* in 1886, Saskatchewan legislators have adapted the legal system we received to changing local conditions. It is time the scaffolding was removed. Mr. Justice Bouck of the British Columbia Supreme Court has aptly put the case for reform in terms that apply equally to Saskatchewan:

> [O]ne might ask why should the laws of this province be afflicted by English legislation enacted centuries ago?... Is a community such as British Columbia with its own legislature, its own court system and a modern economy bound to accept the inconvenience of these types of statutes popping up from time to time and disrupting the orderly development of the law.[23]

Those English statutes that remain a useful part of Saskatchewan law should be re-enacted as part of our law; other English statutes should be declared to be no longer in force.

This study provides the necessary background for formulation of legislation to dispose of received law. Those statutes that are identified in the text as having continuing relevance are collected in an appendix, "Disposing of English Statute Law: Proposals", together with suggestions for re-enactment. The list in the appendix is not a comprehensive collection of statutes that have been found to be, or that may be, in force; it deliberately omits those statutes that are no longer of utility, even if a technical argument for reception might be made in some cases.

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[22] See below, pp. 37-38.

[23] John C. Bouck, "Introducing English Statute Law into the Provinces: Time for a Change?" (1979), 57 C.B.R. 74.

Review of received English statute law in Commonwealth countries began at least as early as 1881, when the New Zealand Revision of Statutes Commission prepared a list of "selected Imperial Acts in force."[24] In 1897, the Revised Statutes of Ontario included re-enactments of some English statutes presumed to be of particular historical significance, and some 79 English Statutes were reprinted in the 1897 Revised Statutes of British Columbia.[25] But the New Zealand list carried the caveat that it was "not exhibited as a complete list of Imperial statutes in force". The Ontario collection of statutes was a mere sampling of the received law, and the British Columbia list did not even claim to be "an expression of opinion...with respect to the applicability" of the statutes it contained. The first legislative effort to conclusively dispose of received law was adopted by the Australian State of Victoria in 1922. The *Imperial Acts Application Act*, 1922 was based on a report prepared by Sir Leo Cussen, a judge of the State Supreme Court, after an examination of more than 7,000 English statutes.[26] The Act included a list of statutes in force, and repealed most of the remaining received law.

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[24] See *The Commonwealth Law Bulletin*, 1982 at 226 for a brief history of Imperial statutes research in New Zealand and Australia. The 1881 list was reissued as a "Table of Imperial Acts in Force" in the *Public Acts of New Zealand*, 1931.

[25] Ont: R.S.O. 1897, cc. 322-331. See now R.S.O. 1980, Appendix A. In B.C., some of the statutes were originally published in the 1871 statutes, and an amended list was republished in 1913 (as R.S.B.C., 1911, Vol. 4). In addition, the statute revision commissioners in British Columbia attempted re-enactment of English statutes on a broader scale than in most jurisdictions, particularly in preparation of the 1911 revision. Unfortunately, however, the commissioners often included much that was already obsolete in England, and often adopted legislation copied from English sources that was certainly never in force in the province. The re-enactments are collected in Cote's list (see below).

Although no Canadian jurisdiction prepared a more comprehensive official or semi-official list of statutes in force, W.H.P. Clement did attempt to gather English statutes actually held to be in force in an appendix (Table of Imperial Statutes) to *The Law of the Canadian Constitution*, 1904. The list was updated by J. Cote (1964) 3 *Alberta L. Rev.* 278.

Australia and New Zealand, building upon Cussen's seminal work, have continued to lead the way in legislation relating to received law. A *Report on the Imperial Acts Application*, 1922,[27] issued in Victoria in 1974-75, provided background for new legislation in 1980 that substantially reduced the number of received statutes remaining in force in that state.[28] A bill prepared by the New Zealand Law Reform Council was introduced in the New Zealand Parliament in 1982 as part of "the process of carrying out a review of Imperial enactments." The project aims at enactment of "a definitive list of Imperial Acts to be preserved."[29] Law reform agencies in New South Wales, the Australian Capital Territory, Queensland and South Australia have also issued reports on received statute law.[30] In Canada, law reform agencies have only recently begun to turn their attention to received law in a systematic fashion.[31]

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[26] See *Report of the Joint Select Committee on the Imperial Acts Application Bill, Victoria*, 1922.

[27] Gretchen Kewley, 1974-75, Monash University.

[28] The *Imperial Acts Application Act*, 1980 contained a new list of statutes in force, and "transcribed" some additional Acts "in their original form." The *Imperial Laws Re-enactment Act*, 1980 enacted a modernized version of other received statutes. See *Commonwealth Law Bulletin*, 1981, at 441.

The approach to the review of received law adopted in this study is consistent with the last decade of research in Australia and New Zealand. Sir Leo Cussen tended to resolve doubt about the status of an

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[29] *Commonwealth Law Bulletin*, 1982, at 226. Two reports on the Bill have subsequently been issued by the Council.

[30] Law Reform Commission of New South Wales, *Report on the Application of Imperial Acts*, 1967; Law Reform Commission of the Australian Capital Territory, *Report on Imperial Acts in force*, 1973; Queensland Law Reform Commission, *Working Paper on Imperial Statutes*, 1979; Law Reform Commission of South Australia, *Reports* 54, 55, 78, 79, 85, 86, and 89 (1978 to 1981).

[31] The Law Reform Commission of British Columbia has undertaken pioneering research in this country. The Law Reform Commission of Saskatchewan is indebted to the British Columbia Commission for its assistance, particularly in the early phases of its own work. Unfortunately, the *Annual Report* of the British Columbia Commission (1984/85) reported that although

> considerable progress was made in organizing... materials, and a preliminary list of statutes has been established, [due to] pressure of other Commission work,...at least for the foreseeable future, no work can be undertaken on this project which will culminate in a formal Commission report.

Legislation and proposals in other Commonwealth jurisdictions include: Law Commission of India, Fifth Report: *British Statutes Applicable in India*, 1957; R.S. Regan, *Report on English Statutes in Papua*, New Guinea, 1973; *Application of English Law Ordinances* in Sarawak (1947), Hong Kong (1966), and Gibralter (1962); *The Law of England (Application) Law*, Western Nigeria (1959).

English enactment by recommending that it be retained in force. As the New Zealand Law Reform Council has noted, "He was breaking new ground and understandably adopted a cautious approach." Recent legislation and proposals have sought to eliminate as much of the received law as possible:

> When the Imperial Acts came under scrutiny in New South Wales, Victoria and the Australian Capital Territory during the years 1967 to 1980, there was an increasing willingness to repeal Imperial enactments.... Mrs. Gretchen Kewley stated that the object of her review of the *Imperial Acts Application Act*, 1922 (Vic.) was to clear away as much as possible the dead wood.[32]

While the work in other Commonwealth jurisdictions has provided a valuable starting point for research, it must be noted that lists of statutes in force in Australia and New Zealand cannot be transferred to Canada without considerable revision and reconsideration. Reception dates are significantly different.[33] Local conditions, which bear heavily upon the question of reception, varied greatly on reception dates in different parts of the Commonwealth. Perhaps most important are the differences in local legislative history since reception. For example, the New Zealand *Property Law Act*, 1952 codifies much of the received law of real property, making recourse to English statutes unnecessary in most cases. Saskatchewan has no equivalent legislation.

This analysis of received law differs from the approach adopted in

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[32] *Commonwealth Law Bulletin*, 1982, at 233.

[33] 1840 was established by statute as the reception date in New Zealand, and 1828 is the relevant date in Australia.

Australia and New Zealand in one important respect. It has introduced a historical perspective, rather than compiling lists of statutes based on reported decisions and piecemeal analysis of the English statute books. Each of the chapters in Part II of this report attempts to provide a brief history of legislation on the subject matter under consideration, placing it in political and social context. The historical perspective has made it possible to accurately focus on those episodes in English legal history which produced most of the statutes that continued to be significant at reception date and beyond. It is hoped that this approach will increase the value of this study to other Canadian and Commonwealth law reform agencies undertaking similar research.

PART 1: PRINCIPLES

CHAPTER I

ENGLISH LAW IN SASKATCHEWAN: THE HISTORICAL BACKGROUND

1. THE EFFECT OF THE NORTHWEST TERRITORIES ACT

The Northwest Territories Act, 1886 definitively established July 15, 1870 as the reception date in the territory that later became Saskatchewan. What the legislation effected was, however, a reintroduction of English law. Since settlement had begun on the Prairies before 1870, earlier reception dates had been recognized prior to 1886. In fact, *The Northwest Territories Act* cleared up some confusion about reception dates.

In the decade following 1886, there was considerable local interest in identifying the law applicable in western Canada before that date. The interest was practical: presumably, things done prior to 1886 under the law then in effect remained valid and might still be of some effect after 1886.[1] Today, however, reception dates earlier than 1870 could be relevant only in very exceptional circumstances. For example, title to real property may depend upon the validity of grants made prior to 1886. Since establishment of the provincial land titles system, recourse to the old law may remain necessary only in cases where the property in question is outside the land titles system.[2] A review of the application of the doctrine of reception in what is now Saskatchewan prior to 1886 is included in this chapter primarily as a matter of historical interest.

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[1] See the articles in (1890), 1 West. L.T. on the reception question. Early opinion in western Canada on the question of reception is discussed by J.E. Cote, "The Introduction of English Law into Alberta", (1964), 3 Alta. L. Rev. 262.

The Northwest Territories Act also clarified some matters relating to reception other than the relevant date itself.

Because it was enacted by Parliament at a time when it had plenary legislative authority over the Territories, it was effective to introduce the law of England relating to both matters within the exclusive jurisdiction of the Federal Government, and matters within the jurisdiction of the territorial legislature. But while the criminal law of England in 1870 (for example) became part of the law of the Territories, legislative competence to modify that law remained with the federal Parliament.[3]

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[2] In *Re Provincial Fisheries* (1896), 26 S.C.R. 444, the claim of the Crown in the right of Canada to the beds of navigable rivers was in issue. Chief Justice Strong suggested (at 530) that the issue might turn in part on whether the property in question had been regarded as public land prior to Confederation. See also *Cherry v. Smith*, [1933] 1 W.W.R. 205 (Sask.), holding that the received law is applicable to land not yet brought within the land titles system, or which (such as National Park lands) cannot be brought within the system. Presumably, the applicable law would ordinarily be the law received in 1886, but consideration of a grant made prior to 1886 might require recourse to law received at an earlier date.

[3] The territory to which a particular reception date applies appears to depend, at least in the absence of legislation to the contrary, on the territorial subdivisions recognized on the date the reception occurs. Since the original reception of English law in all parts of Canada occurred before Confederation, there was at Confederation no unique reception date for law within the exclusive jurisdiction of the Federal Government. Although it is likely that Parliament could do so, it has not established a Canada-wide reception date for matters within federal jurisdiction. Rather, Parliament has conformed to provincial reception dates. For

The legislation also, though perhaps less successfully, attempted to clarify some of the issues relating to the effect of reception.[4] The common law doctrine of reception did not take definitive form until well into the 19th century. The earliest reported decisions on reception were largely confined to distinguishing between the colonies of settlement, which received English law as a matter of course, and colonies of conquest, which retained pre-conquest law until it was altered by British or local authorities.[5] Some doubt may have remained even in 1886 that only

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example, until 1953-54, the *Criminal Code* contained provisions expressly applying provincially-established reception dates to the criminal law in Ontario, British Columbia and Manitoba. The *Northwest Territories Act* made such a provision unnecessary in regard to Alberta and Saskatchewan. See the notes following section 12 in *Tremeear's Annotated Criminal Code*, (5th ed.), Toronto, 1944. The *Criminal Code* now merely provides that:

> The criminal law of England that was in force in a province immediately before the first day of April, 1955 continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada.

(The *Criminal Code*, R.S.C. 1970, c. C-34, s. 7(2)).

[4] See below, Part I, Chapter 2.

[5] The earliest authority on the application of English law in the colonies appears to be *Calvin's Case*, (1609) 7 Co. Rep. 1A, 77 E.R. 377, which affirms the continuation of pre-conquest law (when the conquered country was not "heathen"); the position of a colony of conquest was further clarified in *Campbell v. Hall* (1774), 20 St. Tr. 230, 98 E.R. 1045 (which was kinder to the laws of non-Christian subjects). When Blackstone published his commentaries in 1765, virtually the only authority addressing reception in colonies of settlement was an opinion of Richard West dated June 20, 1720. West wrote that:

> All statutes in affirmance of the common law passed in England antecedent to the settlement of any colony are in force in that colony unless there is some private act to the contrary, though no statutes made since these

law applicable to the condition of the territory was received,[6] nor was it perhaps entirely clear that a reception date operated as a cut-off rendering English law enacted after the reception date inapplicable to the colony. Finally, the *Colonial Laws Validity Act*, 1865 confirmed the proposition that received law could be modified or repealed by the local Legislature,[7] but the drafters of the 1886 provision apparently thought it wise to expressly so stipulate.

> settlements are there in force unless the colonies are particularly mentioned.

(George Chalmers, "Opinions of Eminent Lawyers", vol. 2, 202.) It was not until *Attorney General v. Stewart* (1817), 2 Mer. 143 that a fully developed doctrine of reception was recorded in any reported decision.

[6] See below, p. 34. The principle of applicability was recognized at common law. Whether this principle applied to a statutorily-established reception date in the absence of an express stipulation was a matter of some controversy - in *MacDonald v. Levy* (1833) Legge 39 (New South Wales), it was held that the statute in question reaffirmed the common law doctrine, and thus imported by implication an applicability test. Anglin J. expressed a similar opinion in *R. v. Fares*, [1932] S.C.R. 78, but the Ontario Court of Appeal expressed the contrary view in the perhaps anomalous decision in *Kewatin Power v. Town of Canora* (1908), 16 O.L.R. 184. See generally, J.E. Cote, "The Reception of English Law", (1977) Alta. L.R. 29, at 50.

[7] 28 & 29 Vict., c. 63. Prior to this Act, some colonial courts had held that colonial laws conflicting with any enactment of the English Parliament were invalid. The legislation was intended to clear up the confusion. See Keith, *Responsible Government in the Dominions* (2nd ed.), Toronto, 1928, 338-340. The common law reception formula contemplated, however, that the Parliament at Westminster could continue to adopt laws made directly applicable to "colonies", as did the *Colonial Laws Validity Act*. That jurisdiction was abrogated by the *Statute of Westminster*, 1931. See below, Part I, Chapter 2, "Imperial Acts in Force Proprio Vigore". The formula in the *Northwest Territories Act* also preserved federal plenary legislative authority over the territories. The *Saskatchewan Act*, 1905 repeated the proposition that received law could be modified "by the Parliament of Canada or the Legislature", presumably preserving federal jurisdiction in regard to received law relating to subjects assigned to the federal government by the *British North America Act*.

2. HISTORICAL BACKGROUND

The earliest settlements on the Canadian Prairies were French fur-trading posts. The French claim to the territory beyond what is now the eastern border of Manitoba was tenuous at best, but the Treaty of Utrecht, which ceded New France to Britain, did purport to apply to "the bay and streights of Hudson, together with all lands, seas, sea coasts, rivers and places situate in the said bay and streights, and what belong thereunto".[8] Perhaps for that reason, it has been suggested that the first European law in force on the Prairies was French civil law. But while Sir Henry Strong was attracted by this argument in the *Re Provincial Fisheries* case in 1896, it has found little other support.[9] The English claim to the western lands draining into Hudson's Bay antedates the Treaty of Utrecht. The Charter granted to the "Governor and company adventurers of England trading into Hudson's Bay" on May 2, 1670 made the Company "the true and absolute lords and proprietors" of

> those seas, streights, bays, rivers, lakes,

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[8] Article 10 of the Treaty, quoted in Re Provincial Fisheries, *supra*, note 2.

[9] *Ibid.*, at 530. The Royal Proclamation of 1763 replaced the pre-conquest laws of the former French possessions in North America with the English law, though the extent of the Proclamation's effect is not entirely clear. French law in matters of "property and civil rights", but not criminal and testamentary laws, was re-established in the old province of Quebec by the *Quebec Act* (1774) 14 Geo. 3, c. 83. The Proclamation of 1763 has been held to have established English law in Prince Edward Island, but not in the other Maritime provinces (see Cote, "The Reception of English Law", *supra*, note 6, at 87-88.) On the reception of French law in western Canada generally, see Cote, "The Introduction of English Law in Alberta", *supra*, note 1.

> creeks and sounds in whatsoever latitude they shall be that lie within the entrance of the streights, commonly called Hudson's streight, together with all the lands and territories upon the countries, coasts, and confines of the seas, bays, lakes, rivers, creeks and sounds as aforesaid that are not already actually possessed by or granted to any of our subjects or possessed by the subjects of any Christian prince or state....[10]

The Charter also empowered the company to make laws and administer justice in the territory that became known as Rupert's Land. The date of the *Charter* has been held to have been the date of the first reception of English law in Rupert's land. In *Walker v. Walker*, Lord Haldane expressed the opinion that "there is no doubt that the settlors brought with them to that region such of the laws of England in 1670 as were applicable under the circumstances."[11] Although the company began the exploitation of Rupert's Land almost immediately after the grant of the *Charter*, it did little to encourage settlement until the establishment of the Selkirk colony in 1811. Since the Privy Council did not deal with the question of the reception of law in Rupert's Land until long after the fact, it may not be safe to conclude that 1670 would have been universally recognized as an appropriate reception date when Rupert's Land actually existed as a political entity. There is at least some authority for the proposition that reception does not occur in a sparsely settled territory until a legislative assembly has been established, capable of modifying and extending the received law.[12] In any event, the Imperial Parliament apparently treated Rupert's Land as an essentially unorganized territory in a series of enactments relating to the trial of criminal offences. In 1821, it was enacted that criminal offences committed in Rupert's Land might be tried in the nearest British colony according to the law of place of trial.[13] In effect, the legislation made the criminal law of Upper Canada apply in western Canada. Similar legislation, providing for trial of offences committed outside the Selkirk colony in British Columbia or in Upper Canada, was adopted by the Imperial Parliament in 1859.[14]

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[10] See *Charters, Statutes, Orders-in-council, etc. relating to the Hudson's Bay Company*, London, 1960, 3-21.

[11] [1919] 2 W.W.R. 935 at 936 (P.C.). It seems likely that at least part of the real property law of England was directly introduced by the Charter itself. The Charter recited that the company was to hold its lands "as of our manor of East Greenwich, in our County of Kent, in free and common socage...". In *A-G (Alberta) v. Huggard Assets*, [1953] 2 All E.R. 954 (P.C.), it was said that:

> ...It is well established that settlors import into a settled colony the common law and statute law of their country as it existed at time of settlement, and so far as applicable to the settled territory. But the terms of the Charter would seem to make resort to this rule superfluous so far as the establishment of socage tenure is concerned.

In 1811, the Company granted 116,000 square miles in the southeastern part of Rupert's Land to Lord Selkirk. Selkirk brought settlors to his grant, which formed the nucleus of the Selkirk or Red River colony in what is now Manitoba. The Selkirk grant was organized as the District of Assiniboia, and a legislative assembly established under the authority of the Hudson's Bay Company Charter. In 1862, the Assembly adopted an Ordinance providing that:

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[12] The date of the establishment of the first Legislative Assembly in the colony has been held to be the reception date in Nova Scotia, New Brunswick and Newfoundland. See Cote, "The Reception of English Law", *supra* note 6, at 48. In *Yonge v. Blaikie* (1822), 1 Nfld. L.R. 276, choice of the date upon which the Legislative Assembly was established was said to conform to the interpretation of the doctrine of reception "given it by the colonial lawyers".

[13] 1 & 2 Geo. 4, c. 66, s. 5. This Act extended to Rupert's Land earlier legislation applicable generally to offences committed outside of any British colony.

[14] 22 & 23 Vict., c. 26.

> In place of the laws of England of the date of the Hudson's Bay Charter, the laws of England of Her Majesty's assession, so far as they may be applicable to the condition of the colony, shall regulate the proceedings of the general court, until some higher authority or this council itself shall have expressly provided, either in whole or in part to the contrary.[15]

There appears to have been some doubt about the effect of the reception Ordinance; it was amended in 1864 to provide:

> To remove all doubts as to the true construction of the 53rd article of the code of 11 April, 1862, the proceedings of the general court shall be regulated by the laws of England, not only of the date of her present Majesty's assession so far as they may apply to the conditions of the colony, but also by all such laws in England of subsequent date as may be applicable to the same; in other words the proceedings of the general court shall be regulated by the existing laws of England for the time being, in as far as the same are known to the court, and are applicable to the condition of the colony.[16]

Thus the reception date of June 20, 1837 established by the original Article appears to have been replaced by a doctrine of reception with no cut-off date.

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[15] The Laws of Assiniboia, April 11, 1862, Article LII.

[16] *Ibid.*, January 7, 1864, Article T.

The 1864 formula presumably remained in effect until the province of Manitoba established its own reception date. The scope of the Ordinance is, however, somewhat uncertain. On its face, it would appear to have adopted merely procedural law, though it is unlikely that that was the intent. Furthermore, the territory to which it applied was uncertain. Assiniboia covered much of southern Manitoba. The Ordinances of Assiniboia, however, provided that "all local enactments when not expressly intended further, shall apply only to that part of the District of Assiniboia which forms the Red River settlement and its environs".[17]

On June 23, 1870, Rupert's Land and other British territories between the Red River and the Rockies became part of the Dominion of Canada. The Canadian Parliament adopted "An Act for the temporary Government of Rupert's Land and the North-Western Territory when united with Canada", which expressly provided that:

> All the laws in force in Rupert's Land and the North-Western Territory, at the time of their admission into the union, shall so far as they are consistent with "the British North America Act, 1867", - with the terms and conditions of such admission approved by the Queen under the 146th section thereof, - and with this Act, - remain in force until altered by the Parliament of Canada, or by the Lieutenant

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[17] *Ibid.*, Article I.

Governor under the authority of this act.[18]

This legislation presumably preserved both the law received and enacted in the Red River colony, and the law received as of 1670 in the rest of Rupert's Land. It should also be noted that the Act applied to both "Rupert's Land and the North-Western Territory". Thus it also had the effect of preserving the law in force in those parts of southwestern Saskatchewan, Alberta and the North that were not part of the Hudson's Bay watershed. To contemporaries, this state of affairs must have appeared to be one of confusion. It is not surprising that local legislatures took little time to establish a new reception date.

The *Manitoba Act* was adopted in 1870, carving the new province of Manitoba out of Rupert's Land. The legislation was silent on reception of law in Manitoba, and expressly continued the temporary Government Act in force outside the new province.[19] The Provincial Legislature in 1874 enacted that English law "relevant to property and civil rights" as of July 15, 1870 was in force in Manitoba.[20] Since this only covered matters within the competence of the Provincial Legislature, it was later supplemented by dominion legislation.[21] July 15, 1870 was chosen as reception date because it was the date upon which Manitoba was admitted to Confederation.[22]

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[18] S.C. 1869, c. 3, s. 5.

[19] S.C. 1870, c. 3, s. 36.

[20] S.M. 1874, c. 12, see now R.S.M. 1970, c. C-280, s. 51(3).

In 1884, the Legislative Assembly of the Northwest Territories copied the Manitoba legislation. An Ordinance of that year provided that:

> In all matters of controversy relative to property and civil rights in the Territories, the laws of England, as they stood on the 15th day of July, A.D. 1870, are hereby declared to have been in force since such date, and shall govern and inform the rule for decision of the same in the Territories, except insofar as the same have been since such date, or may be hereafter repealed, altered, varied, modified, or affected by any act of the Imperial Parliament made directly applicable to the Northwest Territories, or the Parliament of Canada, or by ordinance of the Lieutenant Governor in Council.[23]

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[21] The *Manitoba Laws Act*, 1888, S.C. 1888, c. 33, s. 1; see now R.S.C. 1927, c. 124, s. 4. The federal legislation dealt only with reception of law within the competence of the Federal Parliament.

[22] Choice of that date was, in fact, fortuitous. Several Acts were assented to on July 14, 1870. The highest chapter number assigned to Acts proclaimed on that date was c. 30 (*The Wages Attachment Abolition Act*). No further Acts were assented to until August 1 (33 & 34 Vict., c.31, a statute relating to the consolidated fund). C. 30 and Acts with lower chapter numbers enacted during the session of 1870 (33 & 34 Vict.) may have been received as part of the law of Manitoba and other jurisdictions with the July 15 reception date. Acts with higher chapter numbers are definitely not in force.

[23] Ordinance No. 26 of 1884, s. 1. The Ordinance is reproduced in (1900), 1 Terr. L.R. xvii. Cote, *supra* note 1, describes the Ordinance as of "doubtful validity" because it "conflicted with" the Federal Act of 1869 "which presumably continued in force in English law as of 2nd May, 1670." However, the 1869 Act provided that the old law was to remain in force "until altered by [inter alia] the Lieutenant Governor under the authority of this Act." Section 2 of the Act provided for appointment of a Lieutenant Governor

The Ordinance was superseded by *The Northwest Territories Act*, 1886 without change in the reception date. The dominion legislation went beyond the Ordinance, however, in that it provided for the reception of English law within the competence of both Parliament and local legislature.

The Saskatchewan Act[24] and the Alberta Act[25], both adopted in 1905, merely preserved the existing reception date. Technically, however, the 1905 legislation has been held to have introduced the law of the Northwest Territories, not the law of England, into the new provinces.[26]

> to make provision for the administration of justice therein, and generally to make, ordain, and establish all such laws, institutions and ordinances as may be necessary for the peace, order and good government of Her Majesty's subject and others therein....

[24] S.C. 1905, c. 42, s. 16.

[25] S.C. 1905, c. 3, s. 16.

[26] *Toll v. C.P.R.* (1908), 8 W.L.R. 795.

APPENDIX

Because English statutes that have not been considered in any reported Saskatchewan decision may have been considered elsewhere in Canada, the reception dates in other jurisdictions are relevant when considering the reception issue in Saskatchewan.

The following summary is adapted from J.E. Cote, "The Reception of English Law", (1977), 15 Alberta L.R. 29, at 86-92.

Nova Scotia and New Brunswick

The reception date is usually taken as October 3, 1758, the day upon which the Legislative Assembly of the colony of Nova Scotia first met. New Brunswick became a separate colony in 1784.

Prince Edward Island

The Royal Proclamation of October 7, 1763, introducing English law into former French colonies, is usually taken as the reception date.

Newfoundland

The reception date has been held to be December 31, 1832, the day before the first Legislative Assembly met in the colony.

Quebec

The *Quebec Act* (1774), 14 Geo. 3, c. 83 reintroduced French civil law in matters of "property and civil rights", but retained English law, introduced by the Proclamation of October 7, 1763, in criminal and testamentary matters.

HISTORICAL BACKGROUND

Ontario

English law was introduced in matters of "property and civil rights" by the Upper Canadian Legislature in 1792 by S.C. 1792-1831, c. 1, as of date of assent to the Act. Later enactments set the reception date at October 15, 1792 (see now R.S.O. 1970, c. 367). English criminal law was presumably introduced by the Proclamation of October 7, 1763, since Upper Canada was not separated from Quebec until 1791.

Manitoba

The Manitoba Legislature introduced English law in "property and civil rights" matters by S.M. 1874, c. 12, setting the reception date at July 15, 1870. See now R.S.M. 1970, c. C-280, s. 51(3). The Dominion Parliament set the same reception date for matters in federal jurisdiction by S.C. 1886-87, c. 25, s. 3 (re-enacted R.S.C. 1927, c. 124, s. 4).

Saskatchewan

July 15, 1870 was established for all matters by *The Northwest Territories Act*, 1886; continued by *The Saskatchewan Act*, 1905, S.C. 1905, c. 42, s. 16.

Alberta

July 15, 1870 was established for all matters by *The Northwest Territories Act*, 1886; continued by *The Alberta Act*, 1905, S.C. 1905, c. 3, s. 16.

Northwest Territories

July 15, 1870 was established by *The Northwest Territories Act*, 1886. See now R.S.C. 1970, c. N-22, s. 18(1).

Yukon

July 15, 1870 was established by *The Northwest Territories Act*, 1886, continued by S.C. 1898, c. 6, s. 9 (now R.S.C. 1970, c. Y-2, s. 22(1)).

British Columbia

English law as of November 19, 1858 was extended to the whole of B.C. by Act No. 7, 1867 (see now R.S.B.C. 1960, c. 129). There is no federal legislation establishing a reception date for matters within federal jurisdiction, but various pre-Confederation statutes and orders-in-council suggest that 1858 may apply.

CHAPTER II

THE PRINCIPLES OF RECEPTION

1. INTRODUCTION

The rules developed by the courts to govern the application of English law in British colonies and Dominions have evolved over the last three centuries. As J.E. Cote has noted:

> ...[F]or this reason...discussions of the present topic are sometimes indexed or classified under the heading "Legal History". But the rules are part of present day law, and many of them are being applied and expounded continually.[1]

Although identification of those English statutes that remain a vital part of the law of Saskatchewan should not be based on rigid application of the reception rules, the rules provide an essential basis for the inquiry.

There are two types of statutes adopted by the Parliament at Westminster that are in force in Saskatchewan, each governed by its own rules. The English law received on July 15, 1870 accounts for most of the English statutes in force. Strictly speaking, only these statutes should be referred to as "received law". In addition, prior to the

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[1] J.E. Cote "The Reception of English Law", (1977) Alta. L.R. 29. This chapter is heavily indebted to Cote's discussion of the reception rules.

Statute of Westminster in 1931, some Acts of the Imperial Parliament were made directly applicable to the colonies. Such statutes are said to be in force *proprio vigore*.

2. IMPERIAL ACTS IN FORCE PROPRIO VIGORE

Acts in force *proprio vigore* represent an exercise of the paramount legislative authority of the Imperial Parliament. For that reason, the term "Imperial statutes" is sometimes used as a synonym for statutes in force *proprio vigore*.[2] Statutes in force *proprio vigore* did not become law in Saskatchewan because they were part of English law in 1870. They would have applied to Saskatchewan, because the Imperial Parliament intended them to apply, even if Saskatchewan had not received English law. In fact, statutes in force *proprio vigore* are not necessarily part of the law of England at all. It was not uncommon for Parliament to adopt legislation for a colony that was not in force at home.[3]

The principle used to determine whether an English statute applies *proprio vigore* to a colony was set out in general terms by the Privy

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[2] The term is not without difficulty. It is inaccurate to the extent that until adoption of the *Constitution Act*, 1982, the British Parliament retained authority to approve constitutional changes in Canada, even though Canada had long ceased to be an Imperial dependency. In addition, received laws as opposed to statutes in force *proprio vigore* have also occasionally been referred to as "Imperial statutes".

[3] An obvious example was the *British North America Act*, 1867 and other colonial constitutions.

Council in *Attorney General for Alberta v. Huggard Assets.*[4] Their Lordships stated that:

> An Act of the Imperial Parliament today, unless it provides otherwise, applies to the whole of the United Kingdom and to nothing outside the United Kingdom, not even to the channel islands or the Isle of Man, let alone to a remote overseas colony or possession... Their Lordships were unaware that there was, in 1660 [when the statute under consideration was adopted], any technical rule of draftsmanship governing the geographical area to which an English Act of Parliament was presumed to apply where its terms are silent on the point. The question whether such an Act applied outside England...must depend in such circumstances on the intention of its framers, to be deduced from the nature of its subject matter and substantive provisions. It would presumably have no external application if its subject matter were beyond the question of a merely insular and domestic import.[5]

Most Imperial statutes adopted in the last three centuries have included a provision expressly extending the operation of the legislation to the colonies. In consequence, the courts have been reluctant to find a statute in force *proprio vigore* by implication. As early as 1769, Lord Mansfield held that: "No Act of Parliament made after a colony is planted, is construed to extend to it, without express words showing the intention of the Legislature that it should."[6] In 1864, a judge in Upper Canada expressed the opinion that: "While I admit the power of the Imperial Legislature to apply by express words its enactments to this country, I will never admit that, without express words, they do apply or are intended to apply."[7] Nevertheless, it cannot be safely concluded that a statute can never be found to be in force *proprio vigore* by implication. As recently as 1891, the Privy Council held that "if a consideration of the scope and object of a statute leaves the conclusion that the Legislature intended to affect a colony, and the words used are calculated to have that effect, they should be so construed."[8]

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[4] [1953] 2 All E.R. 954 (P.C.).

[5] *Ibid.*, at 441 and 569.

[6] *R. v. Vaughan* (1769), 4 Burr. 2494; 98 E.R. 308.

The Imperial Parliament's power to enact laws for British colonies and Dominions remained absolute until the *Statute of Westminster*. Section 4 of that Act provided that no future statute of the United Kingdom extends to a Dominion "...unless it is expressly declared in that Act that the Dominion has requested and consented to the enactment thereof."[9]

The *Statute of Westminster* did not render Imperial statutes adopted prior to 1931 no longer in force.[10] Nevertheless, it did blur the distinction between statutes in force *proprio vigore* and received law. Prior to 1931, repeal of a statute in force *proprio vigore* by the Imperial Parliament meant that the statute was no longer in force in the colonies to which it applied.[11] Since the *Statute of Westminster*, a statute cannot be repealed by the British Parliament insofar as it is in force *proprio vigore* in a Dominion.[12] Similarly, until 1931 a statute in force *proprio vigore* took precedence over any statute adopted by a Dominion legislature.[13] Section 2(2) of the *Statute of Westminster*, however, provided that:

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[7] *Penley v. Beacon Assurance Co.* (1864), 10 Grant Ch. 422.

[8] *Callender v. Colonial Secretary of Lagos*, [1891] A.C. 460, quoted with approval in *Re Eades* [1917] 2 W.W.R. 65 (Man.).

[9] (1931), 22 Geo. 5, c. 4. Section 7(1) reserved jurisdiction to amend the Canadian Constitution, however. It provided that nothing in the *Statute of Westminster* is deemed to repeal or amend the *British North America Acts*, 1867-1930. The *Constitution Act*, 1981 now contains an amending formula applicable in the future, but even that Act derives its status from an Act of the British Parliament - The *Canada Act*, 1982, s. 1. The *Canada Act*, 1982 also repealed sections 4 and 7(1) of the *Statute of Westminster*, but provides that no statute of the United Kingdom shall extend to Canada (s. 2).

> No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such act, order, rule or regulation insofar as the same is part of the law of the Dominion.

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[10] *Canada Steamship Lines Ltd. v. Mile Charland Ltd.*, [1933] Ex. C.R. 147. Similarly, the *Canada Act*, 1982 will not affect the status of an act in force *proprio vigore*.

[11] *Bank of Upper Canada v. Bethune* (1833), 4 U.C.Q.C. 165.

[12] The repealing or amending statute adopted by the British Parliament could take effect only as a statute in force *proprio vigore* itself, and would thus infringe section 4 of the *Statute of Westminster*.

[13] The paramountcy of Imperial legislation "extending to the colony to which such law may relate" was affirmed by the *Colonial Laws Validity Act*, 1865, 23 & 29 Vict., c. 63, s. 2.

Section 7(2) extended the authority to repeal Imperial Acts to the Provincial Legislatures.[14]

For the purposes of this study, there is little reason to distinguish between received law and statutes in force *proprio vigore* adopted before 1870. The distinction is of practical consequence only in exceptional cases. It might, for example, be argued that a statute in force *proprio vigore* throughout the Empire before 1670 does not apply to Saskatchewan. However, there is at least some authority for the proposition that an Imperial statute applies to colonies established after the date the Statute was adopted.[15]

Greater care must be taken to identify Imperial statutes adopted between 1870 and 1931. Fortunately, there are few statutes in this category. Apart from constitutional statutes, most of the post-Confederation statutes in force *proprio vigore* in Canada were designed to assist the Dominion Government, rather than assert Imperial authority. Until the *Statute of Westminster*, the Canadian Parliament lacked jurisdiction to adopt legislation with extra-territorial effect.[16] Such legislation is almost exclusively confined to matters within federal jurisdiction.[17]

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[14] "The provisions of section 2 of the Act shall extend to laws made by any of the provinces of Canada and to the powers of the legislatures of such provinces." Section 2(1) of the Act also expressly provided that the *Colonial Laws Validity Act* no longer applied.

[15] See Cote, "The Reception of English Law", *supra*, note 1, at 34, citing *R. v. Jameson* (1896), 65 L.J.M.C. 218.

3. RECEIVED LAW

(i) The Test of Applicability

The *Northwest Territories Act*, 1886 provided that those laws in force in England on reception date that were "applicable to the Territories" became part of the local law. Recourse to the common law reception rules is necessary to give content to the applicability test. As an Alberta judge noted in *Brand v. Griffin*:

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[16] Section 3 of the *Statute of Westminster* expressly provides that "the parliament of a Dominion has full power to make laws having extra-territorial operation", but section 6 preserved the jurisdiction of Courts of Admiralty established by Imperial legislation.

[17] See S.G.G. Edgar, *Craies on Statute Law* (7th ed.), London, 1971, 479:

> In the case of merchant shipping and admiralty jurisdiction and the *Foreign Enlistment, Fugitive Offenders and Extradition Acts*, the intervention of the British Parliament is essential, the colonies only having such powers of extra-territorial legislation as are expressly conferred by their Constitution Acts or other British legislation.

See also Tarring, *Law of Colonies* (4th 3d.), and W.H.P. Clement, *The Law of the Canadian Constitution*, (1904), Appendix E: Table of Imperial Statutes. The post-Confederation statutes made applicable to Canada included the *Foreign Enlistment Act*, 1870; *Extradition Acts*, 1870, 1873, 1895 and 1906; *Fugitive Offenders Act*, 1881; and *Official Secrets Act*, 1889.

Rather anomalously, English bankruptcy legislation was given some application to the rest of the Empire. The *Bankruptcy Act*, 1914 (4 & 5 Geo. 5, c. 59) provided that "every British court...shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy..." In *Re Graham* [1928] 4 D.L.R. 375 (Sask. K.B.), Taylor J. thought it "farfetched" to term a Canadian court "British", but these doubts were not shared by Bigelow J. in *Re Graham* [No. 2] [1929] 3 D.L.R. 353 (Sask. K.B.). Other provisions in English bankruptcy legislation purported to give English orders effect through British territory - see *Callender v. Colonial Secretary of Lagos*, *supra*, note 8. Since bankruptcy is a matter within federal jurisdiction, the present status of English bankruptcy law need not be further considered here.

A few other post-1870 enactments apparently in force *proprio vigore* are discussed elsewhere in this report.

> ...There can be no doubt I think, that the introduction of the word [applicable] into the statute was suggested by a long series of decisions in the courts of the eastern provinces with reference to the statutory introduction of laws of England into those provinces, in which decisions the question whether or not a certain English statute should be considered in force was always made to depend upon its suitability or applicability, or as it was often expressed, its applicability to the condition of the country.[18]

There is little question that the applicability test requires consideration of both the purpose of the statute under consideration in its English context, and the social and physical conditions in the jurisdiction where the statute is to be applied. The problem of applicability, at least on a first level of analysis, was aptly summarized in a 1917 decision:

> Canadian courts have frequently decided against the applicability of English statutes to Canadian conditions but the rejection of those statutes has been based, not on an opinion as to their wisdom and good policy, but rather upon an opinion as to the "workability" if I may coin a word.[19]

Many English statutes are unlikely to be held applicable when such an approach is adopted. Moreover, because received statutes, unlike the common law, cannot be modified by the courts to better fit contemporary conditions, the courts have been more reluctant to find that a statute has been received than that a common law rule is applicable. The Nova Scotia Court of Appeal in *Uniacke v. Dickson* went so far as to suggest that while common law rules are generally in force, the opposite is true of English statutes.[20]

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[18] [1908] 9 W.L.R. 427. But see above, p. 16 in regard to the applicability test at common law and under earlier statutes.

[19] *Makoweki v. Yachimyc*, [1917] 1 W.W.R. 1279.

Much of the statute law adopted before the beginning of the 19th century served purposes long since extinct, even in England. Maitland's advice to Cambridge law students in 1887 is still relevant:

> Piles of statutes are heaped up...but we may turn page after page of the statute book of any century from the 14th to the 18th, both inclusive, without finding any change of note made in the law of property, or of the law of contract, or the law about thefts and murders, or the law as to how property may be recovered or contracts may be enforced, or the law as to how persons accused of theft or murder may be punished. Consequently in Hale's day and in Blackstone's day, a lawyer whose business lay with the common affairs of daily life had to keep the statutes of Edward I constantly in mind; a few statutes of Henry VIII, of Elizabeth, of Charles II he had to remember, but there were large tracts of past history which had not supplied one single law which was of any importance to him in the ordinary course of his business. To a certain extent this is true even now, even after the vigorous legislation of the last 60 years.[21]

A large part of the legislative activity of the English Parliament has always been concerned with strictly local matters. Consider, for example, the 119 Acts adopted by Parliament in 1820, the first year of the reign of George IV. Of those Acts, no more that 20 appear to relate to matters of more than local concern; of those approximately half were repealed before reception date. Several others, such as *An Act Relating to Accounts of Colonial Revenues*, were likely in force *proprio vigore*, but were repealed after reception date. Only one, *An Act Relating to Insolvent Debtors*, is a strong candidate for reception.[22]

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[20] (1848), 2 N.S.R. 287.

[21] F.W. Maitland, *The Constitutional History of England*, Cambridge, 1919, 19-20.

Rejection of statutes of merely local concern follows from the basic concept of applicability, but the courts have simplified the task of ruling upon them to a considerable extent. It has been held that English statutes applicable on their face to only one part of England, or to peculiarly English institutions are not in force.[23] Taxation and revenue statutes have invariably been held not to be in force.[24] Blackstone was of the opinion that "police" statutes do not form part of a colony's received law.[25] This proposition has been taken as authority for the rejection of regulatory provisions relating to local government and administration, such as curfews, licensing of taverns, and harbour regulations.[26] Blackstone also provided authority for rejection of statutes establishing the Church of England, and those parts of the ecclesiastical law applying to purely religious matters.[27]

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[22] See the *Chronological Table and Index of the Statutes*, 13th ed. (1235-1895), vol. 1, 227-229. The First ten acts adopted in 1820 are representative: cc. 1, 2 - civil list: South Sea So.; c. 3 - insolvent debtors; c. 4 - crim. law, Scotland; c. 5 - Supreme Court, Ireland; c. 6 - benefice; cc. 7, 8 - customs; c. 9 - vessels built at Malta, & etc.; c. 10 - supply.

[23] See, for example, *Hesketh v. Ward* (1858), 17 U.C.Q.B. 667, holding that statutes concerning escape warrants that made reference to the Marshalsea and the Fleet did not become part of the law of Upper Canada.

[24] See *Yonge v. Blaikie*, (1822), 1 Nfld. L.R. 276, where it is noted that the raising of revenue is a function of the local government, which it must carry out through its own legislation.

But when the obvious examples of inapplicable statutes have been weeded out, the residue includes more than a few hard cases. It is not always easy to characterize the purpose of legislation, or to measure its "workability" when transplanted from England. One response to the hard cases has been the elaboration of technical rules relating to the proper time at which conditions in England and in the colony are to be compared.

Consideration of social conditions in England is an important part of the applicability equation to the extent that those conditions throw light on the purpose the legislation was designed to serve. Two dates have been identified as the relevant time in England - the date in which the statute came into force in England, and the date of reception. If the former is chosen, the court must ask whether the problem the statute was designed to remedy still exists. For example, the common law rule in *Shelley's case* was held not to be in force in Alberta, because the rule was designed to meet the needs of a feudal society - a social condition which could hardly be said to have existed in Alberta at any time.[28] Such an approach precludes reception of a statute if its modern rationale differs from the original reasons for its adoption. Many of the basic principles of English property law, for example, are feudal in origin but undoubtedly remain part of the living law. While the weight of authority appears to support the proposition that it is the conditions in England when the statute was enacted that are relevant to the reception question, there is some authority to the contrary.[29]

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[25] 1 Bl. Com. 107.

[26] See Cote, *The Reception of English Law*, *supra*, note 1, at 77-8; *McDonald v. Levy* (1883), Legge 39; *Ruddick v. Weathered* (1889), 7 S.C. 491 (N.Z.).

[27] *Supra*, note 25, at 107. See also *Bishop of Natal* (1865) 3 Moo. 3 P.C. (N.S.) 115, 16 E.R. 43, and *Bishop of Columbia v. Cridge* (1874), 1 B.C.R. 5 (B.C.S.C.), holding the *Church Discipline Act*, 1840, 3 & 4 Vict., c. 86 not in force in B.C.

The authorities are also split on the question of whether the relevant date on which the conditions in the colony should be examined is the reception date or the date at which the statute is considered by the courts. Conceptually, if the reception of English law is intended to provide a foundation upon which a local legal system can develop, it would seem logical to consider conditions in the colony on the reception date. Cote refers to this as the "infant colony theory".[30] It was the approach supported by Blackstone, who did not believe that "the artificial refinements and distinctions incident to the property of a great and commercial people" were applicable to the colonies.[31] But the Privy Council in *Cooper v. Stuart* thought the law had changed since Blackstone's time:

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[28] *Re Simpson Estate*, [1927] 3 W.W.R. 534 (C.A.), affirmed on other grounds, [1928] S.C.R. 329.

[29] See *A.G. v. Stewart, (1817), 2 Mer. 143*; *A.G. Vict. v. Mods*, [1927] V.L.R. 130.

> Blackstone, in that passage, was setting right an opinion attributed to Lord Holt, that all the laws in force in England must apply to an infant colony of that kind. If the learned author had written at a later date, he probably would have added, that, as the population, wealth and commerce of the colony increased, many rules and principles of English law, which were unsuitable to its infancy will gradually be attracted to it.[32]

More often than not, the courts have approached the hard cases from a less technical point of view than the authorities summarized above would suggest. The practical impact of holding a statute in force has probably been a more important consideration than the choice between rival theories concerning the time at which social conditions are to be compared. It is not surprising that it has been held that a statute long regarded as in force in practice should be held to be in force even if a strict application of the reception rules would suggest otherwise.[33] Nor is it unreasonable to conclude, as did Chief Justice Haliburton in *Uniacke v. Dickson*, that as local legislature activity increases, the courts "should become more cautious in the adoption of laws that have never been previously introduced into the colony".[34]

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[30] Cote, *The Reception of English Law*, *supra*, note 1, at 66.

[31] *Supra*, note 25. See also *Quan Yick v. Hines*, *supra*; *Uniacke v. Dickson*, *supra*; *Plestead v. McLeod* (1910), 12 D.L.R. 700 (Sask. D.C.).

[32] (1889), 14 App. Cas. 286, at 293.

The practical approach to reception issues is perhaps best exhibited by the way in which the courts have dealt with the reception of procedural law. Matters of practice and procedure are within the inherent jurisdiction of the superior courts, supplemented in Saskatchewan and most other jurisdictions by the power to make rules of court. Colonial courts can be expected to adopt English procedure, insofar as it is suitable, and to modify it for their own purposes. The first Rules of Court in Saskatchewan were substantially based on the English Rules of Court then in force. This is not a case of reception of English law in a true sense, and in fact makes formal reception undesirable. If statutory rules are held to have been received, they may straightjacket the development of procedure adapted to the local court structure. There are some cases in which procedural content in English statute law has been held to have been received,[35] but the courts have avoided such a conclusion whenever possible.[36] In *Board v. Board*, the Privy Council held that the English *Divorce and Matrimonial Causes Act*, 1857, had been received in Alberta. One of the objections raised to reception was the apparent lack of legal machinery to enforce the Act in Alberta; jurisdiction under the Act was vested in a Divorce Court, and no such court existed in Alberta. Nevertheless, the Privy Council held that the Alberta Supreme Court, as a Superior Court of Record, had jurisdiction in matrimonial causes. Thus, the substantive content of the legislation could be held in force, while the express procedural provisions of the Act were rejected.[37]

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[33] See *Slapp v Webb* (1850), 1 N.S.W.S.C.R. App. 54 (Aust.). Similarly, mortmain legislation has been held to be in force in Ontario at least in part because there is a reference to it in Ontario legislation - see *Doe D. Anderson v Todd* (1846), 2 U.C.Q.B. 82 (C.A.).

[34] *Supra*, note 20. In that case, it was held that the Statutes of 33 Hen. 8, c. 39 and 13 Eliz. I, c. 4, which gave the Crown a lien on the lands of certain public officials as security for fulfilment of their bonds were not in force in Nova Scotia. Chief Justice Haliburton was less concerned with application of technical reception rules than with the fact that the statutes would be, if applied, "...destructive of that security of purchasers of real estate which our registry acts were passed to ensure".

(ii) Amendment and Repeal of Received Law

The *Northwest Territories Act* provided that received English law could be "repealed, altered, varied, modified or affected" by the local

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[35] *Kelly v. Jones* (1852), 7 N.B.R. 473.

[36] *Hauer v. Hauer* (1956), 20 W.W.R. 89 (Sask. Q.B.) quoting *May v. May*, [1934] 3 W.W.R. 471 (Sask. C.A.).

[37] [1919] 2 W.W.R. 940.

Legislative Assembly.[38] Although the power to modify received law was recognized by the common law reception doctrine, there is surprisingly little authority on repeal and amendment of received law.

Express repeal or amendment is a simple process, clearly authorized by the *Northwest Territories Act*. The Saskatchewan Legislature has disposed of English statutes both by direct repeal[39] and by declaring a statute to be no longer in force in the province.[40] In England, periodic Statute Law Revision Acts during the late 19th century eliminated many of the older English statutes.[41] But very few English statutes have been expressly affected by Saskatchewan legislation. Unfortunately, the relationship between Saskatchewan statutes and the received law often depends upon whether Saskatchewan legislation has impliedly repealed an English statute, and that is a question which does not admit of an easy answer.

The only clear rule of construction governing implied repeal is the proposition that a statute of general application inconsistent with or repugnant to later legislation is repealed by implication.[42] Whether the rule is exhaustive of the situations in which an implied repeal of an English statute occurs is not so clear. If a local statute copies the provisions of an English Statute, virtually re-enacting it as a piece of local legislation, it has been held that the English statute is thereby repealed.[43] But often the local legislation traverses the same subject matter, perhaps embodying established rules from statute and common law in some respects, and legislating differently in others. Logically, the key question in such cases of overlap is whether the Legislature intended the new Act to be a complete code. Where there is a plain intention to codify or consolidate the law on any specific subject, it would seem reasonable to assume that the Legislature did not intend to preserve received law relating to the same subject matter, even if it is not strictly inconsistent with the new legislation. Pierre Cote, in a recent treatise on the interpretation of legislation in Canada, argues that when new legislation is tantamount to a consolidation of the law in a particular area, it should be regarded as impliedly repealing earlier legislation. Differences between the old and new enactments may be evidence of implied repeal.[44] Similarly, in *The India*, Dr. Lushington was of the opinion that:

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[38] The statute also provided, of course, for modification of received law within federal jurisdiction by Parliament, and by Acts of the Imperial Parliament in force *proprio vigore*.

[39] Section 45 of the *Limitation of Actions Act*, 1932, S.S. 1932, c. 18, provided that a number of enactments listed in the section are "hereby repealed". See below pp. 248.

[40] *An Act respecting the Imperial Debtors Act*, 1869, S.S. 1918-19, c. 83 declared both the *Imperial Debtors Act*, 1869, 32 & 33 Vict., c. 62 and the common law relating to attachment of the person for debt to be no longer in force.

[41] A series of Statute Law Revision Acts were passed between 1861 and 1891. See the "Table of Statutes".

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[42] See generally, E.A. Driedger, *Construction of Statutes* (2nd ed.), Toronto, 1983, 226-235; *Hauer, supra*, note 36.

[43] *Hazelwood v. Webber* (1934), 52 C.L.R. 268 (Aust. H.C.).

> Although the presumption is against such a repeal, a statute will be repealed by implication if its provisions are wholly incompatible with the subsequent statute or where the subject matter has been so dealt with by subsequent legislation that it cannot reasonably be said that the provisions of the earlier statutes were intended to subsist.[45]

Nevertheless, the law remains unsettled.

Perhaps the best example of the uncertainty surrounding implied repeal is provided by the rather curious fate of the *Real Estate Charges Act*, commonly referred to as *Locke King's Act*, in Saskatchewan. The legislation, adopted in 1854, provided that a mortgage on real property devised by will is "primarily" a charge on the realty, so that the devisee takes the property subject to the mortgage.[46] This reversed the common law rule under which the mortgage debt would be payable out of the personal property and residue in preference to the real property. The statute was amended in 1867.[47] Section 1 of the amendment made it clear that a general direction to pay debts was not sufficient to oust the general rule established by *Locke King's Act*. Section 2 provided that "mortgage" in the context of the Act included any lien for unpaid purchase money, thus encompassing an agreement for sale. The legislation was further amended after reception date, apparently because the original enactment contained language that appeared to limit it to legal estates of freehold.[48] The amendment was broad enough to apply to equitable charges of any nature, including a statutory charge.[49]

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[44] P. Cote, *The Interpretation of Legislation in Canada*, Cowansville, 1984, 80-83.

[45] (1864), 33 L.J. Adm. 193.

[46] 17 & 18 Vict., c. 113.

[47] 30 & 31 Vict., c. 69.

There is no doubt that *Locke King's Act*, as amended before reception date, was received as part of the law of Saskatchewan.[50] However, the *Wills Act*, 1907 incorporated the English legislation in part. The Locke King's provision of 1907 *Wills Act* was based on the original 1854 enactment, and section 1 (but not section 2) of the 1867 amendment.[51] On its face, the Saskatchewan provision did not extend to agreements for sale.[52] In *Re McDougall Estate*, the question of the application of the English statute to agreements for sale was placed before the court. Mr. Justice Taylor identified the essential question as "whether in consequence of these enactments [the *Wills Act*] the above quoted section 2 of the amendments [of 1867] to *Locke King's Act* must be taken as having been impliedly repealed." Obviously, if an implied repeal occurred in 1907, then the Locke King's provision in the *Wills Act* would be a complete code of law. On the other hand, if section 2 of the amendment of 1867 remained in force in Saskatchewan, it would extend the definition of mortgage to encompass agreements for sale.[53] Mr. Justice Taylor expressly avoided speculating on the intent of the Legislature; instead, he held that implied repeal occurs only if the two Acts in question are "so inconsistent or repugnant that they cannot stand together". He concluded that section 2 of the 1867 amendment was in force.

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[48] 40 & 41 Vict., c. 34. See *Re Frazer*, [1904] 1 Ch. 726.

[49] *Re Bowerman*, [1908] 2 Ch. 340, holding that a statutory charge for estate duty was encompassed by the new definition.

[50] *Re McDougall Estate*, [1927] 1 W.W.R. 613.

[51] Sections 37-38.

[52] See *Re Waltz Estate*, [1923] 3 W.W.R. 1306.

It is likely that Mr. Justice Taylor, despite his protests to the contrary, reached the decision he did because he doubted that the Legislature could have intended to limit the scope of the Locke King's provision in the *Wills Act* to mortgages. In fact, he suggested that a deficient replication of the English law in the *Wills Act* may have occurred as a result of borrowing from Ontario legislation.[54] In any event, the Legislature acted in the wake of *Re McDougall Estate* to make its intention clear. In 1927, the *Wills Act* was amended by adding a new subsection to section 37[55] that embodied the language used in the English amendments of both 1867 and 1876-77.[56] The narrow approach to implied repeal adopted in *Re McDougall Estate* may have corrected what amounted to a legislative error, but application of that approach in other cases would keep alive extensive tracts of received law which can serve no good purpose at present.

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[53] Taylor, J. appears to have assumed that those parts of the English Locke King's provisions that had been copied by the Saskatchewan *Wills Act* were thereby impliedly repealed. He noted that the *Interpretation Act* provides that where an act or part of an act is repealed and another enactment substituted for it, any reference to the repealed Act is to be read as a reference to the Act substituted for it. Therefore, on Mr. Justice Taylor's analysis, if s. 2 of the 1867 amendment was in force, it would extend the scope of the *Wills Act* provision.

[54] The original Locke King provision in Ontario extended only to mortgages (29 Vict. c. 28, s. 33). It was amended in 1897 to include land secured by equitable charge or lien for unpaid purchase monies (60 Vict. c. 15, s. 4). Since Ontario's reception date is 1792, *Locke King's Act* was not received as part of the law in that jurisdiction. English

For the purpose of identifying those English statutes that remain part of the living law of Saskatchewan, a broader doctrine of implied repeal than evidenced in *Re McDougall Estate* is appropriate. In general, in the analysis of individual statutes that follows, it has been assumed that Saskatchewan legislation codifying or consolidating the law in an area renders English statutes relating to similar subject matter redundant.

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statutes received in Saskatchewan have been re-enacted in the province on more than one occasion when Ontario legislation was used as a model.

[55] S.S. 1927, c. 16.

[56] Thus *Locke King's Act* has now been wholly superseded in Saskatchewan. It is interesting to note that the decision in *Re McDougall Estate* appears to have had consequences even outside the borders of Saskatchewan. In 1927, Alberta adopted a *Real Estate Charges Act* based on *Locke King's Act* as it existed after the 1876-77 amendment (see *Re Melnyk*, [1936] 1 W.W.R. 666, holding the definition of mortgage broad enough to encompass a municipal tax lien.).

PART 2: STATUTES CONSIDERED

CHAPTER I

REAL PROPERTY STATUTES

1. INTRODUCTION

Real property law forms the core of the English legal tradition. For that reason, the courts have consistently held that English real property statutes were received wherever the common law governs.[1] It is true that a few of the older statutes are so thoroughly bound up with history that they can have no application on this side of the Atlantic,[2] but even some of the earliest legislation embodies principles that survive feudal origins. Maitland advised his students that:

> There are at least two statutes of Edward I which you

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[1] See *A.B. v. Stewart* (1817), 2 Mer. 143; *Lindsay v. Oriental Bank Corp.* (1860), 13 Moo. P.C. 401.

[2] Mortmain legislation (*De viris religiosis*, 1279, 7 Edw. 1; (1391), 15 Ric. 2, c. 5; (1695), 7 & 8 Will. 3, c. 37) and the *Charitable Uses Act*, 1735, 9 Geo. 2, c. 36 constitute the largest group of English real property statutes that have almost uniformly been held not to apply outside England. Mortmain legislation restricted gifts of land to monasteries and by extension, other bodies corporate, apparently to preserve feudal dues for the Crown. Charitable uses legislation is usually grouped with it because post-reception English legislation encompassed both topics (*Mortmain and Charitable Uses Act*, (1888) 51 & 52 Vict., c. 24). See *Re Miller Estate* [1918] 1 W.W.R. 929 (Sask. S.C.), *Re Fenton Estate* [1920] 2 W.W.R. 367 (Man. C.A.); *Re Pearse Estate* (1902), 10 B.C.R. 380 (B.C.C.A). Mortmain and charitable uses legislation has also been held not to be in force in West Indies, Australia, and India. The legislation was held to have been received in Upper Canada (*McDiarmid v. Hughes* (1888), 16 O.R. 570), but apparently only because local legislation made reference to it. It was re-enacted as the Ontario *Mortmain and Charitable Uses Act*, (R.S.O. 1980, c. 280, repealed S.O. 1982, c. 12).

> will have to know well - *De donis conditionalibus* and the *Quia emptores terrarum* - these are still the pillars of our land law; to pull them away without providing some substitute would be to bring the whole fabric to confusion.[3]

De donis is no longer part of our law. While it was almost certainly received,[4] it was repealed by implication when the estate tail was abolished in western Canada.[5] But *Quia emptores* remains in force, and several other statutes can be placed in the same category, providing part of the basic foundation of real property law. These statutes are discussed below under the heading "Foundation Statutes". In addition, there are statutes like the *Partition Act*, 1868 that are less fundamental in concept, but more important in practice. The *Partition Act* and a few other received statutes are routinely applied by Saskatchewan courts to resolve disputes involving real property. These statutes are discussed below under the heading "Statutes Frequently Applied".

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[3] F.W. Maitland, *Constitutional History of England*, Cambridge, 1919, 20.

[4] *De donis*, 1285, 13 Edw. I (Stat. Westmin. sec.), c. 1, created the estate tail, replacing an earlier device to keep property in the grantee's direct line of descent - the "conditional" or "base" fee. The statute was held to be in force in Australia (*Re Swinden* (1882), and re-enacted in the Ontario *Act Respecting Real Property*, S.O. 1897, c. 330 repealed S.O. 1956, c. 76). The estate tail was never common in Canada, but was still of some practical significance in 1886.

[5] *The Territorial Real Property Act*, S.C. 1886, c. 51, s. 12 provided that transfer of an estate tail operates to convey a fee simple and prevented creation of new entailments. The legislation also abolished the conditional fee. The provision was repeated in *The Land Titles Act*, S.C. 1894, c. 28, and the first Saskatchewan *Land Titles Act*, S.S. 1906, c. 24, s. 7. See now R.S.S. 1978, c. L-5, ss. 243-244. See also *The Wills Act*, R.S.S. 1978, c. W-14, s. 31, which prevents the creation of an estate tail by will.

The Saskatchewan Legislature has done little to directly affect the status of received real property statutes, though some of the miscellaneous rules of law included in *The Queen's Bench Act* are based on English statutes,[6] and in a few cases, local legislation has clearly been substituted for English law.[7] The fusion of legal and equitable jurisdictions in the Court of Queen's Bench has also rendered some received real property law irrelevant.[8]

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[6] See for example, *The Queen's Bench Act*, R.S.S. 1978, c. Q-1, s. 45, rule 2. At common law, a life tenant had a right to commit waste unless the grant stipulated to the contrary. *The Statute of Gloucester*, 1278, 6 Edw. 1, c. 5 reversed the rule. *The Queen's Bench Act* provision reverses the rule, but appears to go further than the 1278 statute. In particular, in flagrant cases of waste (so-called "equitable waste"), equity would intervene even if the grant made the tenant unimpeachable for waste. The *Queen's Bench Act* provision, adopted from the English *Judicature Act*, 1873, 36 & 37 Vict., c. 66, s. 25(3) was intended to merge the equitable rule with the old statutory rule. See below note 8.

[7] *The Prescription Act*, 1832, 2 & 3 Will. 4, c. 71. Section 72 of *The Land Titles Act*, *supra*, note 5, provides that:

> No right to the access and use of right or any other easement, right in gross or profit a prendre shall be acquired by any person by prescription, and no such right shall be deemed to have been so acquired prior to the coming into force of the Act.

The Prescription Act provided that an easement could be established by evidence of user for 20 years. The common law recognized a similar prescription period, but on the fiction of a "lost grant" of easement. *The Land Titles Act* appears to preclude prescription even in regard to land outside the system: The provision was first enacted O.N.W.T. 1903(2), c. 7, s. 1, and included in *The Limitation of Actions Act*, R.S.S. 1909, c. 50 until repeal of that Act in 1932, when it was re-enacted in *The Land Titles Act* (R.S.S. 1940, c. 98, s. 65).

[8] See, for example, the *Mortgage Act*, 1733, 7 Geo. 2, c. 20, re-enacted as part of the *Common Law Procedure Act*, 1852, 15 & 16 Vict., c. 76. The legislation permitted a court of law to stay an action to recover possession of mortgaged premises upon payment of principle, interest and costs. Equity would, of course, have permitted redemption in any event. The legislation was probably received in 1870, and was in fact re-enacted in British Columbia as the *Mortgagors' Relief Act*, R.S.B.C. 1960, c. 249. It is "practically obsolete owing to the fusion of legal and equitable jurisdictions" (Victor Di Castri, *Thom's*

REAL PROPERTY

The most significant innovation in real property law in Saskatchewan has been the adoption of the land titles system. Although *The Land Titles Act*[9] is primarily concerned with registration and priorities, it has indirect, though wide-ranging, impact on basic real property concepts.[10] Much of the received law relating to conveyancing is simply irrelevant in the context of the land titles system. It is not surprising that even the major property law reform project of the 19th century, the *Real Property Act*, 1845, was held not to be in force in British Columbia because much of it concerns deeds and conveyancing.[11] But it must be remembered that not all land in the province has been brought within the land titles system,[12] and that property may still be

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Canadian Torrens System (2nd ed.), Calgary, 1962, 480).

The English *Judicature Act*, 1873, 36 & 37 Vict., c. 66, s. 25 included some "rules of law" that modified law and equity to ensure that equitable principles would prevail in the unified court system established by that Act. Although the *Judicature Act* was adopted after reception date, the substance of s. 25 was enacted in Saskatchewan (the *Queen's Bench Act*, s. 45). Some of the rules re-stated and modified by the *Judicature Act* were statutory in origin - see above, note 6, and below, note 87.

[9] *Supra* note 5.

[10] It should be noted that *The Land Titles Act* contains more than a few miscellaneous provisions governing all land, whether within the land titles system or not. Many of them, like the provisions relating to estates tail, derive from the *Territorial Real Property Act*, which established the Torrens system in western Canada, but also enacted some more general provisions relating to real property and succession. See note 5.

[11] *Horse and Carriage Inn Ltd. v. Barron* (1975), 53 D.L.R. (3rd) 426 (B.C.C.A.). See below, p. 25.

[12] Unsurveyed lands in the northern part of the province, and Crown lands in some other parts of the province, are not within the system.

conveyed outside the system (by trust deed, for example). In *Cherry v. Smith*, the law applicable to the Prince Albert National Park, which is not within the land titles system, was considered. The court concluded that:

> Since there is no other statute of Saskatchewan dealing with this matter, it follows that the law of England as introduced by the *Northwest Territories Act* is the law applicable to the present case.[13]

In the result, some statutes that have little practical application under the land titles system remain part of the law of Saskatchewan. Such statutes are discussed below under the heading "Other Statutes".

2. FOUNDATION STATUTES

Blackstone wrote that:

> The law of real property in this country is now formed into a fine artificial system, full of unseen connections and nice dependencies, and he that breaks one link of the chain endangers the dissolution of the whole....[14]

Although the development of English land law was largely the work of the Courts of Law and Equity, its history has been punctuated by a series of statutes, the names of which are known to every law student even if their modern relevance is not always clear. They are not apt to be consulted in the day-to-day work of lawyers and judges, but without them the law of real property would lose its internal consistency and logic.

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[13] [1933] 1 W.W.R. 205 (D.C.).

[14] Hargrave, *Tracts Relative to the Law of England* (1787), 489.

(i) Quia Emptores and Feudalism

Megarry and Wade observe that:

> *Quia emptores*, 1290 is still in force today.... It operates every time that a conveyance in fee simple is executed, automatically shifting the status of tenant from grantor to grantee and fulfilling the rule that all land held by a subject shall be held in tenure of the Crown either mediately or immediately.[15]

To properly understand the effect of *Quia Emptores*,[16] it is necessary to recall that under the feudal system land was held by a tenant or vassal from a lord in return for services defined by the nature of the tenure upon which it was granted. The feudal pyramid terminated with the Crown, the great Lords holding land as tenants-in-chief of the King. In the early Middle Ages, a vassal most commonly disposed of land by subinfeudation. He granted the land to a new tenant who became his vassal. Alternatively, a vassal could alienate land by substituting a new tenant in his place, thus dropping out of the feudal pyramid himself. A substitution was much like a modern conveyance in function, and gained popularity in the high Middle Ages as a cash economy began to replace a purely feudal economy based upon services.[17] *Magna Carta* implied a general right of alienation without consent of the Lord.[18] *Quia emptores* confirmed that right and, in addition, abolished subinfeudation. In the result, all but a few English fiefs came to be held directly from the Crown. Megarry and Wade write that *Quia emptores* "marked the victory of the modern concept of land as alienable property over the more restrictive principles of feudalism."[19]

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[15] Megarry and Wade, *The Law of Real Property* (4th ed.), London, 1975, 31.

[16] 18 Edw. 1, cc. 1-3. The title, however, is that of Ruff. (18 Edw. 1, st. 1). The title assigned in the Statutes of the Realm is *Stat. d'ni R. de t'ris.*

[17] See generally, A.W.B. Simpson, *An Introduction to the History of Land Law*, Oxford, 1961.

Whether *Quia emptores* is still necessary to shift the status of tenant from grantor to grantee when a transfer occurs under the land titles system is perhaps a debatable point. That subinfeudation would be attempted in Saskatchewan, even in the absence of *Quia emptores*, seems remote. Nonetheless, the concepts embodied in *Quia emptores* are expressly stated nowhere else in the law of real property. It was reprinted in the British Columbia Revised Statutes, 1897, and re-enacted in Ontario in the same year.[20]

(ii) The Statute of Uses and the Decline of Feudalism

Quia emptores was the principal statutory landmark of the first step in the evolution of English land law away from its feudal origins. The

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[18] Magna Carta, 1225, 9 Hen. 3, c. 32 (Ruff.). It did so by introducing an exception to the general rule.

[19] *Supra* note 15, at 31.

[20] *An Act Respecting Real Property*, R.S.O. 1897, c. 330, ss. 1-2.

Statute of Uses, 1535,[21] marked the beginning of the transformation of the medieval law into the modern law of real property. As the feudal system declined in the 16th and 17th centuries, it was replaced by complex trust arrangements designed to keep property in land-owning families from generation to generation. The *Statute of Uses* conditioned the development of the new system. That is true even though the statute failed to achieve the purposes for which it was designed. In 1738, Lord Hardwicke observed that:

> A statute made upon great consideration, introduced in a solemn and pompous manner...has had no other effect than to add at most, three words to a conveyance.[22]

But if the statute had not been enacted, the law of trusts and conveyancing would not have developed as it did.

The modern trust developed out of the medieval "use": a grant to a "feofee to uses" to hold land for the use of a "*cestui que use*" or beneficiary. The courts of Common Law did not recognize the beneficiary's interest under a grant to uses, but by the 15th century the Courts of Equity had intervened, recognizing the beneficiary as the equitable owner of the property. The purposes of the medieval use were somewhat different than those of the trust, however. The grant to uses avoided some of the technicalities of traditional conveyancing,[23] and permitted land to be devised by will.[24] Perhaps most importantly, a grant to uses made it possible to avoid some of the onerous incidents imposed by feudal land law on estates held upon chivalrous tenure. In particular, when legal title descended to an infant male heir, the Crown (as Lord of the land holding vassal) was entitled to take rents and profits as guardian of the infant heir. Similarly, if the heir was an unmarried female, the Crown was entitled to arrange the marriage of the heir to its own profit.

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[21] 27 Hen. 8, c. 10.

[22] *Hopkins v. Hopkins* (1738), 1 Atk. 581, 26 E.R. 365.

The *Statute of Uses* was intended to preserve royal revenue. As Simpson notes:

> Henry VIII was by 1529 becoming short of money, and resolved to meet his need by turning to the feudal revenues which were his as supreme lord, but whose collection was frustrated by the prevalence of uses.[25]

The Statute achieved its purpose by providing that uses are "executed" by operation of law, so that the beneficiary takes legal title to the property:

> Where any person stands...seized of...lands...to the use...of any other person, or...body politic...such person and body politic...shall from henceforth stand...

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[23] See below, pp. 59-60.

[24] See below, p. 101.

[25] Simpson, *supra* note 16, at 175. Henry VIII's Statute was not the first attempt to prevent "fraudulent" uses that reduced royal revenues. A series of medieval statutes curtailing the use, from (1377) 51 Edw. 3, c. 6 to (1504) 19 Hen. 7, c. 15 were apparently ineffective. Most of these statutes were repealed by the *Statute Law Reform Act*, 1863.

> seized...in lawful seisin...of...the same lands...in such like estates as they had...in use...in the same.[26]

The *Statutes of Uses* was never popular. As the feudal system fell further into decline, the courts found ways to circumvent it. By the middle of the 17th century, several exceptions had been carved out of the statute. For our purposes, attention need be directed to only two of them.[27] First, it was held that where an active duty is imposed upon the feofee to uses, the use is not executed. The feofee to uses in such a case was essentially a modern trustee, and it was from this interpretation of the statute that the modern trust arose. Second, in *Sambach v. Dalston* in 1634, the Court of Chancery held that where there is a use upon a use, only the first use is executed.[28] By the end of the century, it was accepted law that the statute could be avoided by a "deed to uses" in which a conveyance is made "to and to the use" of the grantee.[29] The deed to uses became a standard form of conveyance.

The utility of uses for conveyancing purposes was enhanced by the fact that it made livery of seisin unnecessary when land was sold. Livery of seisin was the formal ceremony placing a tenant in possession that was originally part of the feudal investment of a vassal. It became customary to evidence livery of seisin by a written charter, a practice ultimately given legal force by the *Statute of Frauds* requirement that feoffments be "evidenced in writing".[30] Even before the *Statute of Uses*, it was possible to avoid livery of seisin. When land was contracted to be sold, equity recognized the purchaser as taking an interest in use prior to formal livery of seisin.[31] The *Statute of Uses* made it possible to convey the legal as well as the equitable title by a device known as "bargain and sale". Because the Statute executed uses, it had the effect of conveying legal title when a use was created by contract.[32] The bargain and sale lacked the element of public notoriety of livery of seisin. For that reason, the *Statute of Enrolments*[33] was adopted in the same year as the *Statute of Uses.*

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[26] A.H. Oosterhoff, *Cases and Material on the Law of Trusts* (2nd ed.), Toronto, 1983, 5 abridges the "rather complicated" language of the statute in this matter.

[27] Oosterhoff, *Ibid.*, at 6 lists five situations in which it was held that the statute did not execute a use.

[28] (1634), Toth; 188, 21 E.R. 164.

[29] *Tipping v. Cozens* (1694), 1 L.D. Raym. 33, 91 E.R. 918. Here, of course, are the extra words in a conveyance referred to by Lord Hardwicke.

The *Statute of Uses* also made it possible to create a new class of interests in real property: legal executory interests. Before the statute, legal interests were subject to the restrictive common law remainder rules. Grants of the form "to X upon reaching the age of majority" or "to X upon marriage" were void because they did not arise immediately upon the termination of a preceding estate. But because the *Statute of Uses* provided that a *cestui que use* was to be seized of "like estates as they had in...use", interests of this sort became possible if supported by an executed use. Megarry and Wade record that:

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[30] 29 Cha. 2, c. 3. See below, p. 151.

[31] Simpson, *supra* note 17, at 257.

[32] There were, as well, several other conveyancing techniques that similarly avoided livery of seisin. Perhaps the most popular was the "lease and release".

[33] (1535), 27 Hen. 8, c. 16. It required registration of all conveyances of land in an attempt to prevent "secret conveyances" by bargain and sale.

> The effect of the *Statute of Uses*, 1535, was to make it possible to create future interests which had the best of both worlds, giving the owners legal estates and yet being free of the common law remainder rules.[34]

The *Statute of Uses* has been held to be in force in Manitoba,[35] and in Ontario.[36] It was re-enacted as part of Ontario law in 1897,[37] and reprinted in the Revised Statutes of British Columbia in 1897.[38] There can be little doubt that the statute remains part of the law of Saskatchewan. It is unlikely, however, that the companion legislation contained in the *Statute of Enrolments* remains in force.[39]

The modern trust came into existence as an exception to the statute, and the deed to uses has no application to transfers under the land titles system. Legal executory interests may still occasionally be created in Saskatchewan, however. Retention of the *Statute of Uses* could be justified for that reason alone, but in addition, as a New Brunswick court observed in 1836, the provisions of the statute have been "so mingled with the whole body of English real property law that no doubt can exist as to its applicability in any country where that law forms the basis of jurisprudence".[40]

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[34] *Supra* note 15, at 195.

[35] *Sinclair v. Mulligan* (1886) 3 Man. L.R. 481, affirmed 5 Man. L.R. 17 (C.A.).

[36] *Gamble v. Ress* (1850), 6 U.C.Q.B. 396 (C.A.); *Fair v. McCrow* (1871), 31 U.C.Q.B. 599 (C.A.).

[37] R.S.O. 1897, c. 112.

[38] R.S.B.C. 1897, at p. xiv.

[39] The *Statute of Enrolments* was held to be in force in New Brunswick in *Doe de Hanington v. McFadden* (1836), 2 N.B.T. 260 (S.C.). In Nova Scotia, however, the statute was held to have been superseded by provincial registry legislation (*Shey v. Chisholm* (1853), 2 N.S.R. 32 (S.C.)), and it was held not to have been received in Manitoba because the English institutions necessary for enrolment of deeds under the statute do not exist in the province (*Sinclair v. Mulligan, supra* note 35).

The *Statute of Tenures*, 1660[41] completed the remodelling of English land law at the end of the feudal era by formally abolishing the doctrine of tenures. Its enactment when the Monarchy was restored after the Civil War ensured the gentry that the incidents of tenure would not be revived once again by the Crown. Simpson describes the statute in these terms:

> This ill-drafted and obscure Act seems to have been intended to convert all tenures by knight service, sergeanty, and frankalmoign into free and common socage - that is to say, socage which was subject to no services and which was free from customary peculiarities.[42]

Tenure in free and common socage is essentially equivalent to the modern notion of ownership in fee simple. But because no tenure other than free and common socage has ever existed in Saskatchewan,[43] The *Statute of Tenures* is of little relevance in the province. In *A.G. Alberta v. Huggard Assets*, the Supreme Court held that the *Statue of Tenures* had been received in western Canada. The decision was reversed, however, by the Privy Council, which was of the opinion that:

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[40] *Doe de Hanington v. McFadden, supra* note 39.

[41] 12 Cha. 2, c. 24.

[42] *Supra* note 17, at 22-23.

> It seems to their Lordships strange to suppose that such an Act, recording a compromise between the King of England and his people, the main object of which was the abolition of certain peculiarities of our insular medieval land tenure, was intended to apply to a vast tract of country thousands of miles away which was inhabited at the time only by a few Indians and half-castes, people who had never smarted under wardships, marriage and *primer seisin* and almost certainly never heard of them....[44]

(iii) Nineteenth Centure Reform: Abolition of Archaic Actions

The reforms of the 16th and 17th centuries rescued English land law from its feudal origins, but did not succeed in ridding it of archaisms. As Simpson writes:

> To some extent...complexity was a general feature of all branches of the law, but in land law, which harbours many ghosts of a remote past, the disease was particularly gross.[45]

It was only in the second quarter of the 19th century that the political will emerged to "bring the land law into line with the needs of a commercialized, industrial nation."[46] A series of enactments, inspired by the reports of a Real Property Commission established by Parliament in 1829, reworked the principles of real property law for the last time prior to reception date. The principal landmarks of the period include the *Real Property Limitations Act*, 1833[47], the *Fines and Recoveries Act*, 1833[48], the *Real Property Act*, 1845[49], the *Land Clauses Consolidation Act*, 1860[50] and Lord Westbury's *Registration Act*, 1862.[51]

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[43] See above, p. 19.

[44] [1919] 2 W.W.R. 935 (P.C.).

[45] Simpson, *supra* note 17, at 252.

The Real Property Commissioners were of the opinion that establishment of a land registry system was the principal reform required.[52] That aspect of the 19th century reforms has obviously been superseded in Saskatchewan by the land titles system. The commissioners' approach affected the entire legislative project of the

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[46] *Ibid.*, at 253.

[47] 3 & 4 Will. 4, c. 27. See also the *Real Property Limitations Act*, 1837, 7 Will. 4 and 1 Vict., c. 28, and the *Law of Property Amendment Act*, 23 & 24 Vict., c. 38 dealing with the same subject matter.

[48] 3 & 4 Will., c. 74.

[49] 8 & 9 Vict., c. 106.

[50] 23 & 24 Vict., c. 106.

[51] *Lord Westbury's Act*, 24 & 26 Vict., c. 53, was, in fact, a failure. A working registry was not established in England until the *Land Transfer Act*, 1897, 60 & 61 Vict., c. 65.

[52] Simpson, *supra* note 17, at 254.

1830's and 40's, however. Simpson describes it as "patchwork"[53], and much of it focused on procedure and conveyancing. For that reason, its status in Saskatchewan is problematic.

In 1833, Parliament addressed the most obvious archaisms in land law: the survival of medieval "real actions", and the curious fictitious action by "fines and recoveries" used to bar entails and for other conveyancing purposes. Although the reforms were procedural in form, the consequences were broader. Maine noted that "substantive law has at first the look of being gradually secreted in the interstices of procedure", to which Maitland added that "assuredly this is true of real property law...the system of Forms of Actions or the writ system is the most important characteristic of English medieval law...."[54]

The real actions were created by the promulgation of royal writs in the 12th and 13th centuries. They provided the standard forms of action when possession or title to land was at issue until the 17th century, when they were largely replaced in practice by the action for ejectment derived from trespass.[55] That the real actions survived at all primarily had to do with limitation periods. An action for ejectment was founded upon a right of entry. The *Statute of Limitations* of 1623 provided that a right of entry must be exercised within 20 years after it accrued.[56] However, one of the real actions, the writ of right, was subject to a 60 year limitation period established in the reign of Henry VIII.[57]

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[53] *Ibid.*, at 255.

[54] F.W. Maitland, *The Forms of Action at Common Law*, Cambridge, 1968, 1.

[55] See Megarry and Wade, *supra* note 15, at 1130-1135; Simpson, *supra* note 17, at 135-145.

The *Real Property Limitation Act*, 1833 established a uniform limitation period for actions involving land, and to that end also abolished the real actions.[58] Ejectment was abolished by the *Common Law Procedure Act*, 1852[59], though the substantive law was not affected by the change. Presumably, the modern right of action to recover land was received in Saskatchewan as part of the common law.[60] In 1932, however, the province adopted the *Limitation of Actions Act*.[61] Marginal notes to the provisions setting limitation periods in respect to land and providing for extinguishment of title refer to the sections of the 1833

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[56] 21 Ja. 1, c. 16.

[57] (1540) 32 Hen. 8, c. 2. This was the so-called "proprietary real action". The "possessory real actions", such as *novel deseisin* and *mort d'ancestor* were subject to shorter limitation periods. The real actions were also occasionally used for some purposes not explained by limitation periods. Ejectment did not lie for recovery of incorporeal hereditaments, and for technical reasons the writs of dower also remained in use.

[58] Section 36. There were two exceptions - writs of dower and the writ *quare impedit* - but they were abolished by the *Common Law Procedure Act*, 1860, 23 & 24 Vict., c. 126 ss. 26-27.

[59] 15 & 16 Vict., c. 76, s. 3.

[60] Megarry and Wade, *supra* note 15, at 999. See also *The Recovery of Possession of Land Act*, R.S.S. 1978, c. R-7, which is at least a partial codification of ejectment.

[61] S.S. 1932, c. 18.

English Act upon which they are based.[62] The 1833 Act was expressly repealed.[63] To the extent that the abolition of real actions had substantive as well as procedural effect, the Saskatchewan legislation may have repealed more than was necessary or desirable. Nevertheless, it is probably safe enough to characterize the abolition of real actions as a procedural matter, and assume that they will remain dead in Saskatchewan.[64]

Fines and recoveries were fictitious actions intended to clear title. A fine was essentially a conveyance by court order. The grantee commenced action, claiming to be entitled to the land in fee simple. He took good title when the grantor failed to defend. The common recovery was an action in which clear title was recovered against an actual or fictitious tenant.[65] The advantage of these procedures lay in the fact that, through them, a greater interest in land than the grantor possessed could be conveyed. As one of the earliest statutes regulating fines put it:

> ...because the fine is so high a bar, and of so great force, and of a nature so powerful in itself, that it precludes not only those which are parties and privies to the fine, and their heirs, but all other persons in

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[62] Sections 16-20 and 737-38.

[63] Section 45.

[64] It is worth noting that the other archaic forms of action at common law were abolished in England by a mere change in the Rules of Court. See below, p. 218.

[65] 2 Blk. Comm. 350 and 357.

the world....[66]

By the 16th century, the fine was a standard method of barring entails, and was expressly approved for that purpose by statute.[67] Even a married woman, then under severe legal disabilities, was permitted by statute to bar an entail if examined separately on the matter from her husband. But these actions were put to other purposes as well. A recovery could destroy a remainder or reversion, a proposition troublesome enough to be curtailed by statute to the extent of denying a recovery to a life tenant.[68]

Fines and recoveries were abolished by the *Fines and Recoveries Act*, 1833, and the *Real Property Act*, 1845 further provided that "no feoffment" made after the Act came into force should have "tortious operation"[69] by any analogous procedure. As Megarry and Wade note, "Hence forward there was no exception to the principle that a man cannot convey a greater estate than he has."[70] The 1833 Act provided a more straight forward method of barring entails, and the 1845 Act permitted a married woman to bar an entail by deed, rather than upon an examination separate from her husband.[71]

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[66] *Stat. Modus Levandi Fines* (uncertain date, but given by Ruff. as 18 Edw. I. stat. 4). There were a series of medieval statutes concerning fines, the last of which was 4 Hen. 7, c. 24. The statutes established a number of complex rules relating to the procedures, and established who was entitled to a fine or recovery.

[67] 32 Hen. 8, c. 36, which also limited the use of the recovery for that purpose.

[68] 14 Eliz. 1, c. 8.

[69] Section 4.

[70] Meggary and Wade, *supra* note 15, at 203.

The legislation abolishing fines and recoveries was almost certainly received as part of Saskatchewan law in 1886. Its perceived utility in Canada is evidenced by the fact that the most clearly substantive portion of the reforms, the abolition of tortious operation of feoffments, was enacted in Ontario in the *Conveyancing and Law of Property Act*.[72] No doubt, legislative intervention was required to lay the "mumbo jumbo" and "ill-understood mysticism" of fines and recoveries to rest.[73] Nevertheless, it is not necessary to rely on the abolition legislation in Saskatchewan. Fines and recoveries have never been part of the law of the province, and would not be countenanced as a matter of procedure by our courts.[74]

(iv) Nineteenth Century Reform: Conveyancing

The abolition of archaic actions simplified conveyancing. The *Real Property Act*, 1845 removed the remaining medieval survivals that affected conveyancing practice. Section 2 of the Act provided that conveyance of corporeal hereditaments law "in grant as well as in livery". Section 3 required that all conveyances be by deed. Section 5 abolished the technical distinction between a deed and an indenture.[75] Section 6 made contingent, executory and other future interests alienable by deed.[76] Together, these provisions provide the foundation for modern conveyancing. Although largely superseded in England itself by the *Real Property Act*, 1925,[77] the 1845 Act remains the basis of the *Conveyancing and Law of Property Act* in Ontario.[78]

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[71] Section 7.

[72] R.S.O. 1970, c. 85, s. 3

[73] Simpson, *supra* note 17, at 256.

[74] It should be noted that without the support afforded by the medieval and early modern statutes relating to fines and recoveries, it would be very difficult to resurrect them even in the absence of the abolition legislation. Thus if both the older statutes regulating fines and recoveries and the abolition statutes are repealed, fines and recoveries will remain dead.

At the core of the 1845 reform was the establishment of grant by way of deed as the universal form of conveyance. At common law, incorporeal hereditaments were conveyed by grant, but corporeal hereditaments, including land itself, were conveyed by livery and seisin. Although the bargain and sale and other conveyancing devices made possible by the *Statute of Uses* had largely superseded livery of seisin by the early 19th century, it had not been completely supplanted. The bargain and sale could not be used to make a gift, or to convey land into trust. The 1845 legislation expanded the *Statute of Frauds* requirement that conveyances of land be "evidenced in writing". Under the *Real Property Act*, a deed, not merely evidence in writing, was required to convey the property. The deed itself became the conveyance, not evidence of it.[79]

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[75] An indenture was a deed to which two or more persons were parties. At common law, a person could not take a benefit under a indenture unless he was named therein. An indenture was required to be actually indented, or cut with a wavy line, prior to 1845, a survival of the practice of making copies of an indenture on the same parchment for each party, and cutting them apart.

[76] Section 6 was of substantive effect. At common law, contingencies could not be alienated, though equity would enforce contracts to sell them upon valuable consideration.

[77] 15 & 16 Geo. V, c. 20.

[78] *Supra* note 72.

No deed is required to transfer land within the land titles system. Statutory forms for transfer of land and leases are provided for in *The Land Titles Act*.[80] Transfers are not required to be under seal, and are not statutory forms of deed, but are sufficient in themselves to transfer interests in property.[81] The *Real Property Act* is, therefore, largely irrelevant to conveyancing practice under the land titles system. Nevertheless, sections 2, 3, 5 and 6 of the *Real Property Act* may remain necessary parts of the law of Saskatchewan. Land can still be conveyed in Saskatchewan outside the land titles system. If the conveyance is one which is capable of registration within the system, the statutory forms provided by *The Land Titles Act* may be used.[82] A deed may also be used for that purpose. In *McAllister v. Biggs*, the Privy Council confirmed that a deed conveyed at least an equitable interest in land, binding between the parties, in the absence of registration.[83]

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[79] The *Statute of Frauds* required only a written document disclosing the conveyance and signed by the parties bound by it. After 1845, a formal deed, under seal, was required. Equity, however, continued to enforce bare contracts under the maxim that equity deems to be done what ought to be done. On the relationship between contract and conveyance, see Megarry and Wade, *supra* note 15, at 553-579, 604-606.

[80] Section 89 and 118.

[81] "The statutory form of transfer gives a title in equity until registration but when registered it is effect to pass title" (*Thom's Canadian Torrens' System*, *supra*, note 8, at 244).

In at least one context, the status afforded to deeds by the 1845 legislation still appears to be of vital importance. *Inter vivos* trusts are still created by deed. Because a trust is not ordinarily fully constituted until the trust property is conveyed to the trustees, it is customary to include a clause in the trust deed operating as a conveyance of the property. To comply with the requirements for constitution of the trust, the settlor must have done everything within his power to complete the conveyance. Thus where the property in question is shares in a corporation that must be transferred on the registry of the corporation, the standard conveyance clause in not enough.[84] It is enough in regard to realty only by virtue of the fact that the trust deed itself meets the conveyancing requirements established by the 1845 legislation.

The principal reason why the British Columbia court in *Horse and*

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[82] See above note 5.

[83] (1883), 8 App. Cas. 314.

[84] *Milroy v. Lord* (1862), 4 De G.F. and J. 264, 45 E.R. 1185.

Carriage Inn Ltd. v. Barron[85] found the *Real Property Act*, 1845 not to be in force in the province was because the legislation requires conveyances to be by deed, and therefore under seal. In that case, a lease, though in writing and signed by the person to be charged, was not made under seal. No doubt, the seal can be regarded as little more than an unnecessary formality on trust documents and leases that are not registered under *The Land Titles Act*. The position taken by the British Columbia court would be more convincing, however, if the 1845 legislation had done nothing more than establish the formal requirement of a seal.[86] The requirement of sealing is generally well understood by the legal profession in any event.[87]

Three other sections of the *Real Property Act*, 1845 remain to be considered. Section 1 merely repealed the *Transfer of Property Act*, 1844,[88] an ill-conceived *Act* that abolished all contingent remainders, apparently inadvertently. Section 8 of the Act also related to contingent remainders. At common law, a contingent remainder was subject to defeat should the estate supporting it determine by means of forfeiture, surrender or merger before the contingent remainder vested. Equity, on the other hand, protected contingent remainders. An equitable remainder was not subject to defeat by forfeiture, surrender, or merger.[89] Section 8 provided that a contingent remainder wass still capable of taking effect notwithstanding determination of a previous estate. Section 45(3) of *The Queen's Bench Act* overlaps with this provision in part. It provides that merger shall not occur in law where an interest is not "deemed to be merged or extinguished in equity." The Queen's Bench provision does not fully replace section 8 of the *Real Property Act*. Section 8 remains part of the law of Saskatchewan. Finally, section 9 of the *Real Property Act* confirmed the rights of underlessees when the lessee surrenders the term of the lease to the lessor. The section is no longer in force in Saskatchewan, having been re-enacted in *The Landlord and Tenant Act*.[90]

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[85] *Supra* note 11.

[86] The decision is questionable on more technical grounds as well. The court held that the legislation was not applicable to British Columbia at the time of the decision rather than at reception date. On this issue, see above, pp. 39-41.

[87] In fact, the circumstances in which a seal is still required are few. In regard to leases, it should be noted that the *Statute of Frauds* requires a lease to be in writing (and therefore, under seal) only if the lease is for a term of more than three years and does not reserve a rent of more than two thirds the improved value of the lands and premises. If the statutory form provided by *The Land Titles Act* is used for a lease of more than three years, it would appear that no seal is required in any event.

[88] 7 & 8 Vict., c. 76.

3. STATUTES FREQUENTLY APPLIED

(i) Co-tenancy and Partition

Partition or sale under court order of land owned in joint tenancy or tenancy in common is still governed in Saskatchewan by English statute law.[91] At common law, a co-tenant had no legal right to partition in the absence of an agreement.[92] The common law rule was a fetter on free alienation of land. It appears to be for that reason that the *Statute of Partition*, 1539[93] provided that a co-tenant of lands held in fee could obtain a partition as a matter of right. The remedy was further extended to cover co-tenants for life or for a term of years by the *Statute of Partition*, 1540.[94] The legislation was not, however, entirely satisfactory. It authorized only a physical division of the property, with sometimes absurd results.[95] The *Partition Act*, 1868[96] allows a court in appropriate circumstances to order sale of the property rather than a physical division. But the 1868 Act did not replace the earlier Statutes of Partition. The right to partition is still grounded upon the Statutes of 1539 and 1540. Even when the applicant seeks sale rather than physical partition, the remedy can only be granted because the statutes of Henry VIII created the right to partition.

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[89] *Astley v. Micklethwait* (1880), 15 Ch. D. 59.

[90] R.S.S. 1978, c. L-6, s. 9.

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[91] The only Saskatchewan legislation affecting partition is section 26 of *The Matrimonial Property Act*, S.S. 1979, c. M-6.1 which provides for partition or sale of matrimonial property as part of a scheme of distribution of matrimonial property. See *Bay v. Bay* (1984), 38 S.R. 101 on the relationship between *The Matrimonial Property Act* and English partition legislation.

[92] The common law recognized four forms of co-tenancy: tenancy in common, joint tenancy, co-parcenary and tenancy by entireties. Tenancy by entireties was created when land was conveyed to a husband and wife. Section 246 of *The Land Titles Act* provides that such a tenancy may only be created by express words. Co-parcenary, arising when land descended to two or more daughters of a deceased owner, is now extinct. Perhaps anomalously, co-parceners had a legal right to demand a partition at common law.

[93] 31 Hen. 8, c. 1.

[94] 32 Hen. 8, c. 32. Subsequent judicial decisions held that the legislation extended to almost every conceivable circumstance, including co-tenancies subject to executory gifts over (*Murry v. Murry* (1879), L.R. 10, Eq. 346).

[95] See *Turner v. Morgan* (1803), 3 Ves. 143, in which reference is made to a case in which one co-tenant was given the chimneys, fireplaces and stairs of a house.

[96] 31 & 32 Vict., c. 40. Rules 428-432, contained in Part 36 (sale of land, partition, etc.) of the Rules of the Court of Queen's Bench incorporate and extend the principle established by the *Partition Act*, 1868. The substantive content of the rules is supported by the English statute.

The *Partition Act*, 1868 has consistently been found to be in force in Saskatchewan.[97] Since a sale of land in co-ownership is more commonly ordered than partition, it is perhaps not surprising that the 1539 and 1540 Acts have not been expressly considered by the Saskatchewan courts. They are, however, undoubtedly in force in the province by necessary implication. Several provinces have adopted partition legislation, combining both the right to a partition established by the 1539 and 1540 Acts, and the discretionary power to order a sale contained in the 1868 Act.[98]

The relationship between co-tenants is also affected by a provision of the *Administration of Justice Act*, 1705.[99] At common law, there was no obligation to account between joint tenants or tenants in common unless one excluded the other from the property or one had expressly agreed to act as the other's bailiff. Section 27 of the *Administration of Justice Act* created a general right to an accounting:

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[97] The Court of Appeal seems to have assumed the Act to be in force in *Blacklaw v. Beveridge*, [1915] 3 W.W.R. 511, and the Act has been expressly found to be in force by the Court of Queen's Bench in *Grunert v. Grunert* (1960), 32 W.W.R. 509. See also, *Petryshyn v. Petryshyn* (1976), 29 R.F.L. 379 (Sask. Q.B.) and *Bay v. Bay, supra*. The Act has also been held to be in force in Alberta (*Wikstrand v. Cavanaugh*, [1936] 2 W.W.R. 69, affirmed [1936] 1 W.W.R. 113).

[98] See the *Partition of Property Act*, R.S.B.C. 1979, c. 311; *The Law of Property Act*, R.S.M. 1970, c. L-90, s. 18-26; *Partition Act*, R.S.O. 1970, c. 369.

> An action shall and may be brought, and maintained...by one joint tenant, and tenant in common, his executor's administrators against the other bailiff for receiving more than comes to his just share of her portion, and against the executor, and administration of such joint tenant, or tenant in common.

While it may be that equity recognized an obligation to account even before the adoption of the statute,[100] it has been held in Saskatchewan that the right to an accounting rests on the Statute.[101] The provision has also been held to be in force in British Columbia,[102] and is apparently in force in Australia.[103]

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[99] 4 & 5 Ann., c. 3.

[100] See Anger and Honsberger, *The Canadian Law of Real Property*, 1959, Toronto, 194.

[101] *Blacklaw v. Beveridge*, [1939] 3 W.W.R. 511; followed in *King v. King* [1944] 3 W.W.R. 242 (K.B.) and *Reid v. Reid*, [1978] 4 W.W.R. 460 (Q.B.).

[102] *Spelman v. Spelman* [1944] 1 W.W.R. 691 (B.C.C.A.).

[103] *Report of the Law Reform Committee of South Australia Relating to the Inherited Imperial Statute Law of Practice and Procedure in this State*, 22.

(ii) Foreclosure and Sale

Prior to the *Chancery Procedure Amendment Act*, 1852,[104] the courts had no jurisdiction to direct a sale of mortgaged property in an action for foreclosure. Section 48 of the Act provided that:

> It shall be lawful for the Court in any Suit for the Foreclosure of the Equity of Redemption in any mortgaged property, upon the Request of the Mortgagee, or of any subsequent Incumbrancer, or of the Mortgagor, or any Person claiming under them respectively, to direct a Sale of such property, instead of a Foreclosure of such Equity of Redemption, on such Terms as the Court may think fit to direct....

The provision was re-enacted in British Columbia,[105] and has been held to be in force in Alberta in a recent decision.[106] It was also held to be in force in Saskatchewan in 1909.[107] However, in 1970 the Saskatchewan Court of Appeal held in *Industrial Development Bank v. Lees*,[108] without expressly finding that the statute is no longer in force, that it is no longer necessary as a foundation for an order for sale in foreclosure proceedings.

Chief Justice Culliton approached the question of the status of section 48 of the *Chancery Procedure Amendment Act* in *Industrial*

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[104] 15 & 16 Vict., c. 86.

[105] *Miscellaneous Act*, R.S.B.C. 1913, c. 86. See *Locarno Investments Ltd. v. Industrial Mortgage and Finance Co.* (1967), 59 W.W.R. 193 (B.C.C.A.).

[106] *Bank of British Columbia v. Pentanco* [1982] 2 W.W.R. 266 (Alta. Q.B.).

[107] *Canadian Life Assurance Co. v. Vance* (1909), 12 W.L.R. 231 (Sask. C.A.).

[108] (1970), 75 W.W.R. 445 (Sask. C.A.).

Development Bank v. Lees by carefully analyzing the history of the enactment and its Saskatchewan analogues. The *Chancery Procedure Amendment Act* was repealed in England in 1881, but a rule of court was adopted in the same year which provided that:

> If in any cause or matter relating to any real estate, it shall appear necessary or expedient that the real estate or any part thereof should be sold, the court or a judge might order the same to be sold, and any party bound by the order and in possession of the real estate, or in receipt of the rents and profits thereof, shall be compelled to deliver up such possession or receipt to the purchaser, or such other person as may be thereby directed.[109]

Chief Justice Culliton noted that the rule was adapted from section 55 of the *Chancery Procedure Amendment Act*, which permitted the court to order the sale of real estate in any suit in which it was expedient that the real estate be sold "for the purposes of the suit". By deleting the phrase "for the purposes of such suit", the rule, in Chief Justice Culliton's opinion, "extended the power of the court to direct a sale in a foreclosure action when it appeared to be necessary or expedient to do so". The English rule was adopted as a Saskatchewan Rule of Court by the *Judicature Ordinance* No. 6, 1893. It is currently contained in the Rules of the Court of Queen's Bench as Rule 428.

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[109] O. 51, R. 1.

(iii) Sale of Land by Auction

Although the Saskatchewan *Sale of Goods Act* provides some regulation of sale of chattels by auction,[110] the sale of land by auction is still governed by the *Sale of Land by Auction Act*, 1867.[111] The legislation if primarily concerned with reserved bids. Section 5 of the Act provides:

> ...that the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; if it is stated that such land will be sold without reserve, or to that effect then it shall not be lawful for the seller to employ any person to bid at such sale or for the auctioneer to take knowingly any bidding from any such person.

Section 7 of the Act prohibits the reopening of bidding after completion of a sale by auction. The legislation was apparently adopted to resolve a conflict between law and equity. At common law, when an auction was stated to be without reserve, or the conditions of the auction were silent as to reserve, no "puffer" could be employed to bid up the price, and no sale refused for lack of an adequate bid. Equity, however, allowed the vendor one bid to prevent a sale at a sacrificial price even when his right to bid had not been reserved.[112] The *Sale of Land by Auction Act* resolved the dispute in favour of the common law. Section

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[110] R.S.S. 1978, c. S-1, s. 57.

[111] 30 & 31 Vict., c. 48.

[112] See *Parfitt v. Jepson* (1877), 46 L.J.Q.B. 529.

4 of the Act provided, in fact, that "...whenever a sale by auction of land would be invalid at law by reason of the employment of a Puffer, the same shall be deemed invalid in equity as well."

The *Sale of Land by Auction Act* was held in force in Saskatchewan in 1908 in *Re Hind*,[113] and in a series of subsequent decisions prior to 1930.[114] It has more recently been held to be in force in Alberta.[115] The rules set out in the legislation appear to be recognized as correct practice at auction sales in the province. It is likely, however,that this has more to do with the fact that the provisions of *The Sale of Goods Act* relating to sale of goods by auction are similar in content to those of the English statute, and well known to auctioneers.

4. OTHER STATUTES

(i) Legislation to Prevent Frauds in Conveyancing

The problems created by "secret conveyances" attracted the attention of Parliament on several occasions. Such legislation was necessary in the absence of a viable registry system. The *Statute of Enrolments*,

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[113] (1908), 7 W.L.R. 806 (S.C.).

[114] *Canada Permanent Mortgage Corp. v. Jesse* (1909), 2 Sask. L.R. 251 (S.C.); *Baker Lumber Co. v. Lee*, [1912] 2 W.W.R. 142 (K.B.); *Bank of Toronto v. Matheson*, [1928] 1 W.W.R. 846 (K.B.).

[115] *Northwest Trust Company v. Leduc Properties Ltd.*, [1980] 5 W.W.R. 481 (Q.B.), holding that the Act applies to the more common modern practice of sale by closed tender.

1535[116] did not succeed in preventing the abuse of conveyancing techniques lacking an element of public notoriety. In the result, 16th century legislators enacted the *Statute of Maintenance*, 1540[117], designed to stop trafficking in "pretensed titles" and the *Fraudulent Conveyances Act*, 1585,[118] which gave good title to a purchaser of land defrauded by a secret conveyance of the same land to another in a prior transaction. The *Clandestine Mortgages Act*, 1692[119] was adopted to prevent mortgagors who had secretly executed a prior mortgage from granting a subsequent mortgage without disclosure. It deprived the clandestine mortgagor of his equity of redemption under the subsequent mortgage. These Acts were probably received as part of the law of Saskatchewan. The *Maintenance Act* was held in force in Upper Canada.[120] The *Fraudulent Conveyances Act* was re-enacted in a modified form in the Ontario *Law of Property Act* in

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[116] See above, p. 60.

[117] 32 Hen. 8, c. 9 amended by the *Statute Law Revision Act*, 18643. The legislation also dealt with maintenance of law suits, and will be discussed in that context below.

[118] 27 Eliz. 1, c. 4. This Act should not be confused with the better known *Fraudulent Conveyances Act*, 1570 which dealt primarily with fraud against creditors.

[119] 4 Will. & Mar., c. 16.

[120] *Purdy v. Ryder* (1925), Taylor 236. In Nova Scotia the Act was treated as in force on the assumption that it was declaratory of the common law (*McDonald v. McDonald* (1905), 38 N.S.R. 261).

1877,[121] and has been characterized as in force in Canada by textbook writers.[122] Nevertheless, these enactments appear to have no role to play under Saskatchewan law, even if technically in force. Legislation of this type is unnecessary when land is conveyed within the land titles system. In addition, the legislation antedates the development of the modern law of tort and contract, which makes the specific protections provided by the legislation largely a dead letter.[123]

(ii) Legislation Relating to Remainders and Reversions

The *Cestui Que Vie Acts* of 1666 and 1707[124] are also examples of legislation received as part of the law of Saskatchewan, but overtaken by the development of the common law. This legislation creates a presumption of death of the *cestui que vie* upon whose life the continuation of an estate *per autre vie* depends after seven years' absence from the jurisdiction. Since the early 19th century, the common law has recognized a general presumption of death of a person who has not been heard of for seven years.[125] While the legislation may technically remain in force, it adds nothing to the common law.

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[121] *Supra*, note 4, s. 11-12. The 1585 Act was itself the source of a problem. The courts presumed an intention to defraud a subsequent purchaser when a grant was made without good consideration. This made it possible to void any gift of land by reconveying to a purchaser for value (see 15 Hals. (1st), para. 192). The Ontario provisions protect the *bona fide* volunteer, as did English legislation after reception date (*Voluntary Conveyances Act*, 1893, 56 & 57 Vict., c. 21).

[122] Anger and Honsberger, *supra* note 100, at 355.

[123] It should also be noted that the *Maintenance Act* had a criminal as well as civil aspect. The guilty party was required under the Act to pay both damages and a fine. The criminal aspect of the statute has been superseded by section 330 of the *Criminal Code*, R.S.C. 1970, c. C-34.

[124] 18 & 19 Cha. 2, c. 11; 6 Ann., c. 72.

There are some other English statutes modifying the law relating to future interests that cannot be so easily dispensed with. The *Posthumous Children Act*, 1698[126] was enacted to cure a perceived injustice in the common law. At common law, a posthumously born child would inherit land by descent, or take a remainder interest under a will, as if it had been born in its father's lifetime.[127] The rule did not apply, however, to remainders created by deed. The 1698 statute extended the common law rule to cover remainders created by deed as well as by will. The legislation is probably part of the law of Saskatchewan. It was re-enacted in British Columbia in 1911,[128] and is contained in substance in the Ontario *Conveyancing and Law of Property Act*.[129] Although its scope is limited, it has not been superseded.

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[125] *Re Phene's Trusts* (1870), 5 Ch. App. 139, applied in *Re Hiller* (1979), 92 D.L.R. (3rd) 255 (Ont.), traces the history of the rule to its adoption from the civil law *circa* 1816.

[126] 10 Will. 3, c. 22.

[127] *Reeve v. Long* (1694), 1 Salk. 227, 91 E.R. 202.

[128] R.S.B.C. 1911, c. 107.

[129] *Supra* note 72, s. 45.

Similarly, the *Sale of Reversions Act*, 1867[130] may continue to be of some use in Saskatchewan. Equity permitted an expectant heir to bargain away any interest he might receive in the future in an estate, but reserved the right to set aside or modify an agreement made by the expectant heir if he received less than full value for the property. The *Sales of Reversions Act* was intended to protect persons dealing with expectant heirs. It provided that:

> No purchase, made *bona fide* and without fraud or unfair dealing, of any reversionary interest in real or personal property shall hereafter be open or set aside merely on the ground of undervalue.

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[130] 31 & 32 Vict., c. 4.

SUMMARY - STATUS OF LEGISLATION CONSIDERED

1. STATUTES OR PROVISIONS OF STATUTES THAT HAVE BEEN HELD TO BE IN FORCE, OR THAT ARE LIKELY IN FORCE, AND REMAINING ESSENTIAL.

   Quia emptores terrarum, 1290

   Statute of Uses, 1235

   Statutes of Partition, 1539 and 1540

   Posthumous Children Act, 1698

   Adminstration of Justice Act, 1705, s. 27*

   Real Property Act, 1845, ss. 2, 3, 5, 6, and 8

   Sale of Reversions Act, 1867

   Sale of Land by Auction Act, 1867*

   Partition Act, 1868*

2. STATUTES OR PROVISIONS OF STATUTES THAT MAY BE IN FORCE, BUT WHICH ARE NO LONGER OF ANY UTILITY.

   Statute of Maintenance, 1540 (revised 1868)

   Fraudulent Conveyances Act, 1585

   Cestui Que Vie Acts, 1666 and 1707

   Clandestine Mortgages Act, 1692

   Mortgage Act, 1733

   Fines and Recoveries Act, 1833

3. ACTS OR PROVISIONS OF ACTS THAT WERE RECEIVED, OR LIKELY RECEIVED BUT SUPERSEDED BY SIMILAR SASKATCHEWAN LEGISLATION, OR REPEALED BY SASKATCHEWAN LEGISLATION.

   De donis conditionalibus, 1235**

   Statute of Gloucester, 1278, c. 5

Prescription Act, 1832**

Real Property Limitation Act, 1833**

Common Law Procedure Act, 1852 (in part)

Chancery Procedure Amendment Act, 1852, s. 48

4. ACTS OR PROVISIONS OF ACTS THAT HAVE BEEN HELD NOT TO BE IN FORCE, OR THAT ARE LIKELY NOT IN FORCE.

De viris religiosis Act, 1279***

Statutes of Mortmain, 1391 and 1695***

Statutes of Enrolments, 1535

Statute of Tenures. 1660***

Charitable Uses Act, 1735***

Land Clauses Consolidation Act, 1860

Registration Act, 1862

* Held to be in force by a Saskatchewan court.

** Expressly repealed by Saskatchewan legislation.

*** Held not to be in force by a Saskatchewan court.

CHAPTER II
LANDLORD AND TENANT

1. BACKGROUND

At common law, a leasehold was recognized as an interest in land. A tenant under a lease did not, however, hold the land upon one of the free tenures governed by feudal land law.[1] For that reason, the law of landlord and tenant developed independently of real property law. Although most of the traditional law relating to leaseholds was the creation of the common law and equity, there was significant statutory intervention from at least as early as the *Statute of Marlbridge*, 1267.[2] During the late 17th and early 18th centuries, as the modern lease emerged from its medieval background, the law was largely recast by the *Distress for Rents Acts*, 1689 and 1737,[3] and the *Landlord and Tenant*

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[1] Thus the classification of leaseholds as chattels real. The lease operates *in personam*, "not creating or transferring any rights *in rem*, i.e. rights in the land itself which could affect feudal status" (Megarry and Wade, *The Law of Real Property* (4th ed.), London, 1975, 11).

[2] 52 Hen. 3, c. 4, 15 and 23.

[3] 2 Will. and Mar., c. 5; 11 Geo. 2, c. 19.

Acts, 1709 and 1730.[4] Nineteenth century legislators added only a few additional refinements.[5]

Much of the Saskatchewan's *Landlord and Tenant Act* is a consolidation of English statute law.[6] In the 1920 Revised Statutes, marginal notes identified the English statute upon which each section of *The Landlord and Tenant Act* was based. Of the 41 section of the Act with substantive content, all but six were attributed to English statutory sources. In many cases, the Saskatchewan provision was identical to an English provision, but a few modifications were introduced, presumably to adapt the legislation to local conditions.[7] Even some of the provisions not attributed to English legislation appear to have been adapted from the received law.[8]

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[4] 8 Ann, c. 18; 4 Geo. 2, c. 28. There were, in addition, a few other miscellaneous enactments affecting landlord and tenant law: *The Grantees of Reversions Act*, 1540, 32 Hen. 8, c. 34; *The Apportionment Act*, 1834, 4 & 5 Will. 4, c. 22; and some of the provisions of *The Statute of Anne*, 1705, 4 & 5 Ann, c. 3.

[5] The *Landlord and Tenant Act*, 1851, 14 & 15 Vict., c. 25 was confined in application to agricultural tenancies. The *Real Property Act*, 1845 (see above pp. 69-74), and *Law of Property Amendment Acts*, 1859, 22 & 23 Vict., c. 35 and 1860, 23 & 24 Vict. 38 had some provisions relating to leases.

[6] Adopted S.S. 1918-19, c. 79. See now R.S.S. 1978, c. 6. Commercial leases of more than three years' duration must be registered under *The Land Titles Act*, R.S.S. 1978, c. L-5. Although most of the land titles provisions relating to leases are concerned with registration, a few have substantive effect. Residential tenancies are now governed by the *Residential Tenancies Act*, R.S.S. 1978, c. R-22. Section 6(1) of the Act provides that a tenancy governed by the Act "does not create any interest in land". Section 6(2) provides that a lease to which the Act applies "shall be deemed not to be a lease within the meaning of *The Land Titles Act* or *The Landlord and Tenant Act*". Since the legislation is intended to be a code of the law applicable to residential tenancies, received statutes still in force are also likely of no application to leases governed by the Act.

[7] For example, the *Distress for Rents Act*, 1737, ss. 1-2, provided that where a tenant "fraudulently or clandestinely" removed goods from the premises in order to evade distress, the landlord was authorized to seize the goods wherever they might be found within 30 days of the removal. Section 29(1) of *The Landlord and Tenant Act*, 1918-19

There is little doubt that the English landlord and tenant statutes were received.[9] What is surprising is that some of the English legislation survived the adoption of *The Landlord and Tenant Act*. The drafters of the Act left some provisions of the English statutes out of their consolidation. In a few cases, the omissions may have been intentional, and intended as implied repeal of the English law. In other cases, however, the omissions do not seem to rest on any clear policy foundation.

It is likely that even though the provincial Act was drawn directly from the English statutes, the selection was influenced by earlier re-

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provided that the seizure was authorized in the 60 days following the removal (see now s. 30(1)).

[8] For example, under s. 9 of the 1918-19 Act, every lease was deemed to include an implied term permitting the landlord to repossess the premises upon two months' arrears in rent. Sections 16 and 17 of the *Distress for Rent Act*, 1737 permitted the landlord to regain possession in a number of circumstances, including accumulation of a year's arrears in rent (reduced by the *Deserted Tenements Act*, 1817, 57 Geo. 3, c. 52 to a half year's rent). At common law, a landlord had no right to repossess leased premises prior to the determination of the lease unless the lease contained a covenant creating that right. The provisions of the 1737 and 1817 legislation were, in some respects, broader than section 9 of the Saskatchewan Act: A re-entry might also be made under the 1737 Act if the tenant deserted the premises and left them uncultivated or unoccupied. Such provisions are hardly necessary if re-entry can be made after two months' arrears. Section 9 was probably intended to be a complete substitute for the earlier legislation, but in the absence of authority it is uncertain that the earlier legislation has been impliedly repealed.

[9] The *Distress for Rents Act*, 1689 was held to be in force in Man. in 1910 in *Dewer v. Clements* (1910), 15 W.L.R. 341 (C.A.), and the *Grantees of Reversions Act*, 1540 was held to be in force in B.C. in *Mrack v. Huckson*, [1975] 2 W.W.R. 373.

enactment of English law in Ontario. Since the reception date in Ontario is 1792, legislators in that province were selective in adopting nineteenth century English innovations. Inat would explain the omission of three of the four section of the *Landlord and Tenant Act*, 1851 from the Saskatchewan legislation, and the inclusion of a number of provisions from English legislation adopted after 1870.[10] The provision of the 1851 legislation re-enacted in substance in the *Landlord and Tenant Act* is not attributed to an English source, and is identical to an Ontario provision adopted in 1887.[11]

2. RECEIVED LAW IN FORCE

All that remains of the received landlord and tenant statutes are a few miscellaneous provisions from sources as remote as the *Statute of Marlbridge*, 1267 and as recent as the *Landlord and Tenant Act*, 1851. Some of them remain important parts of the law of landlord and tenant.

(i) The Statute of Marlbridge

Although two of the three chapters of the *Statute of Marlbridge*, 1267 relating to landlord and tenant law have been incorporated in the Saskatchewan *Landlord and Tenant Act*, chapter 23 was not re-enacted. It reversed the common law principle that a leaseholder was liable for waste only if the terms of the lease so provided. Under the Statute, "also termors, during their terms, shall not make waste...without special license had by writing of covenant".[12]

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[10] Eg., s. 10 *Landlord and Tenant Act* = 44 & 45 Vict., c. 41, s. 14; *Landlord and Tenant Act* ss. 4, 6 = 55 & 56 Vict., c. 13, ss. 5, 11.

[11] Section 1 of the 1851 Act provided that "growing crops" seized under writ of execution remained liable to distress for rent. S.O. 1887, c. 23, s. 2, identical to s. 25 of the Saskatchewan legislation, prohibited distress of "goods and chattels of any person except the tenant...", but excepts from the rule goods "of a person claiming title under an execution against the tenant". Manitoba also borrowed the Ontario provision, but limited the exception, as did the English Act, to "crops or grain" - see *Enright v. Little* [1917] 1 W.W.R. 123 (Man.).

A provision with similar effect is contained in *The Land Titles Act*:

> In every lease unless a contrary intention appears therein there shall be implied covenants by the lessee:
>
> ...(b) that he will at all times during the continuance of the lease keep and at the termination thereof yield up the demised land in good and tenantable repair, accidents and damages to the buildings from fire, storm and tempest or other casualty and reasonable wear and tear excepted.[13]

The essential identity of the *Statute of Marlbridge* and the *Land Titles Act* provision was recognized by the Saskatchewan courts in *Roberts v. McMannis*,[14] where it was noted that the *Land Titles Act* provision "has not made any change in his [the tenant's] liability...it still being governed by the *Statute of Marlbridge*".

Failure to include the provision in *The Landlord and Tenant Act* created a hiatus requiring recourse to the received law. In *Cherry v. Smith*,[15] it was held to be in force, and applied to a lease of land outside the land titles system. Since only leases for a term of more than three years are registerable under *The Land Titles Act*, the court was uncertain in *Roberts v. McMannis* whether the statutory conditions also applied to shorter term leases of land that had been brought into the system.

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[12] A similar provision was enacted in Ontario (see R.S.O. 1980, c. 90, s. 32). Anger and Honsberger, *The Canadian Law of Real Property*, Toronto, 1959, 42 traced the Ontario provision to the *Statute of Gloucester*, 1278, 6 Ed. 1, c. 5. That statute, however, was primarily concerned with procedure in actions against a tenant committing waste.

[13] *Supra* note 7, s. 120.

[14] [1933] W.W.R. 193 (D.C.).

(ii) Apportionment

At common law, rent could not be apportioned when a tenancy terminated upon the death of the lessee. The *Distress for Rents Act*, 1737,[16] enabled the executors or administrators of a tenant for life to recover an apportioned part of the rent up to the tenant for life's death. The *Apportionment Act*, 1834[17] extended the rule to all cases where leases were determined by the death of the lessee or other person upon whose life the lease depended. Although the scope of these apportionment provisions is narrow, they presumably remain part of the law of the province. Both have been re-enacted in British Columbia.[18]

Broader apportionment legislation, the *Apportionment Act*, 1870, was adopted in England after reception date and therefore did not become part of the law of Saskatchewan.[19] It provides for apportionment in any case where a lease is forfeited prior to the end of the term. Most provinces have adopted apportionment legislation based on the 1870 Act.[20]

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[15] [1933] 1 W.W.R. 205 (D.C.).

[16] 11 Geo. 2, c. 19, s. 15.

[17] 4 & 5 Will. 4, c. 22.

[18] *Commercial Tenancy Act*, R.S.B.C. 1979, c. 54, ss. 10-13.

(iii) The Landlord and Tenant Act, 1709

At common law no action for debt lay against a tenant for life or lives for any arrears of rent during the continuance of the term. An action for this purpose was authorized by section 4 of *The Landlord and Tenant Act*, 1709. This provision probably remains in force in Saskatchewan.[21]

(iv) The Landlord and Tenant Act, 1851

At least one provision of the *Landlord and Tenant Act*, 1851 is likely in force in Saskatchewan and is of considerable practical significance. The common law recognized an exception to the rule that fixtures become part of the reality in regard to fixtures brought onto the property "in furtherance of trade".[22] The courts, however, refused to extend the exception to fixtures used for agricultural purposes.[23] Section 3 of the 1851 Act changed the common law rule, providing that:

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[19] 33 & 34 Vict., c. 35. The Statute was adopted August 15, 1870. It was held not to be in force in *Uglum v. Torkelson* [1930] 3 W.W.R. 26 (Sask. Q.B.).

[20] Alberta, British Columbia and Saskatchewan are the only exceptions. See e.g. *Apportionment Act*, R.S.O. 1980, c. 23.

[21] F. Rhodes, *Williams and Rhodes' Canadian Law of Landlord and Tenant* (5th ed.), Toronto, 1983, 6-7 treats this provision as in force in Canada.

> If any tenant shall...with consent in writing of the landlord...erect any farm building...or put up any building, engine, or machinery, either for agricultural purposes or for the purposes of trade and agriculture... then all such buildings [etc.]...shall be the property of the tenant...[provided that they shall not be removed without giving the landlord notice and opportunity to purchase them].62

Although this provision has apparently not been held to be in force in any reported decision in Saskatchewan or elsewhere in Western Canada, it is described as likely in force in provinces with reception dates later than 1851 in Williams and Rhode's text on Landlord and Tenant Law.[24]

The other two provisions of the 1851 Act not reproduced in the provincial statute are of lesser importance. Section 1 extended tenancies terminated by death of the landlord or tenant to the end of the current year, but applied only to tenancies at "rack-rent", that is, a rental equal to the full value of the tenement. While the provision may be in force, it is of such limited application that it could, as the New Zealand Law Commission suggests, "be repealed without adverse consequences".[25] Section 4 of the 1851 legislation applies to "tithe rent charges". It may not have been received, and can in any event is of no practical significance.

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[22] *Poole's Case* (1703), 1 E.R. 320.

[23] *Elwes v. Maw* (1802), 102 E.R. 510.

[24] *Supra* note 21, at 13:3:6.

(v) The Distress for Rents Act, 1737

Because of the technicalities required to create a valid lease, it is not uncommon for the validity of a lease to be in issue in a dispute between a landlord and tenant. At common law, arrears in rent could be claimed under a valid lease by an action in debt or on the covenant to pay rent. If a tenant had been placed in possession, but there was no valid lease, an action could be brought in assumpsit to recover damages for the tenant's use and occupation of the premises. However, the landlord would be placed at a procedural disadvantage if the existence of a valid lease was in issue in a dispute over rents. The common law would nonsuit the plaintiff who sued upon the covenant when an action in assumpsit was required, or vice versa. Section 15 of the *Distress for Rents Act*, 1737 was designed to avoid this problem. It replaced the action in assumpsit with a new action for reasonable compensation for the use and occupation of property. It further declared that proof that a valid lease had been entered into by the parties did not nonsuit the plaintiff, but would go instead towards establishing the quantum of damages.

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[25] New Zealand Law Commission, *Imperial legislation in force in New Zealand*, Report No. 1, 1987.

Section 14 of the *Distress for Rents Act*, 1737 is not necessary under modern rules of practice and pleading. A nonsuit could be avoided by making alternative claims. The *Distress for Rents Act*, 1737 has been repealed in Ontario.[26] In *Young v. Bank of Nova Scotia*,[27] it was held that the fusion of the Courts of Law and Equity made the strict common law rule which nonsuited the plaintiff no longer applicable, notwithstanding repeal of the English statute. Claims for compensation for use and occupation have been allowed in Saskatchewan without reference to the English statute.[28]

There are a few other provisions in the *Distress for Rents Act*, 1737 that do not appear to have been duplicated in Saskatchewan law. Most of them, however, relate to essentially procedural matters. Whether they were received in 1870 or not, they can now be regarded as superseded by rules of court. Thus, for example, sections 22 and 23 of the *Distress for Rents Act*, 1737 govern procedure in replevin actions. Replevin is now dealt with by Queen's Bench Rules 406-410.

Similarly, sections 4-6 of the *Distress for Rents Act*, 1737 provided a summary procedure where goods not exceeding 50 pounds in value were concealed by a tenant to evade distress. These provisions were not incorporated into *The Landlord and Tenant Act* with the other provisions of the 1737 legislation relating to concealment of goods. That in itself suggests that the summary procedure can be regarded as impliedly repealed, but it has no place in the modern procedural framework. No Saskatchewan court has ever used it, and a landlord could likely proceed summarily under the *Small Claims Enforcement Act* in any event.

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[26] The *Statute Law Revision Act*, S.O. 1902, c. 1, s. 2.

[27] (1915), 23 D.L.R. 854 (C.A.). However, just how the unification of the courts bears on the issue is unclear.

[28] *Laird v. King* [1945] 3 W.W.R. 609 (D.C.); *Armstrong v. Oliver Ltd.* [1933] 2 W.W.R. 462 (C.A.).

The status of section 20 of the *Distress for Rents Act*, 1737 is more equivocal. Section 19 of the Act provided that where a distress is irregular, but not initially illegal, the distrainer was not to be treated as a trespasser, and the tenant could recover only special damages. That provision was re-enacted as section 37 of *The Landlord and Tenant Act*, 1918-19. Section 29 of the 1737 legislation expanded the protection afforded to the distrainer if the distress was irregular. It provided that no tenant could recover in an action based on the irregularity if tender of sufficient amends was made.[29] This provisions was not incorporated into Saskatchewan legislation. Failure to do so may be evidence of implied repeal, but in any event it does not appear to be of any practical significance.

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[29] Section 21 further provided that double costs were available to the distrainer. This provision was repealed by 5 & 6 Vict., c. 97, which generally abolished double and treble costs.

SUMMARY - STATUS OF LEGISLATION CONSIDERED

1. ACTS OR PROVISIONS OF ACTS THAT ARE IN FORCE, OR LIKELY IN FORCE AND REMAIN ESSENTIAL.

   Statute of Marlbridge, 1267, c. 23*

   Landlord and Tenant Act, 1709, s. 4

   Distress for Rents Act, 1737, s. 15

   Apportionment Act, 1834

   Landlord and Tenant Act, 1851, s. 3

2. ACTS OR PROVISIONS OF ACTS THAT MAY BE IN FORCE, BUT WHICH ARE NO LONGER OF UTILITY.

   Distress for Rents Act, 1737, ss. 4-6, 14, 20, and 22-23

   Landlord and Tenant Act, 1851, s. 4

3. ACTS OR PROVISIONS OF ACTS SUPERSEDED BY SIMILAR SASKATCHEWAN LEGISLATION.

   Statute of Marlbridge, 1267, c. 4, 15**

   Grantees of Reversions Act, 1540**

   Distress for Rents Acts, 1689 and 1737**
   (except as otherwise noted)

   Statute of Anne, 1705**

   Landlord and Tenant Acts, 1709 and 1730**
   (except as otherwise noted)

   Deserted Tenements Act, 1817

   Real Property Act, 1845**

   Law of Property Amendment Act, 1859**

   Landlord and Tenant Act, 1851, s. 1

* Held to be in force in Saskatchewan.

** Reproduced in the Saskatchewan *Landlord and Tenant Act*.

CHAPTER III

WILLS, ESTATES AND TRUSTS

1. WILLS AND INTESTATE SUCCESSION

(i) Wills

Although wills distributing personal property were known since Saxon times[1], under feudal law real property descended to heirs and could not be devised by will. In the late Middle Ages, conveyances to uses were utilized to make what amounted to wills disposing of real property. The *Statute of Uses*, 1535 inadvertently put an end to that practice. Simpson writes that "the abolition of the power of devise produced such violent political opposition that within a few years it was restored by the *Wills Act* (1540)."[2] The *Statute of Wills*, 1540[3] allowed landowners to devise two thirds of their land held in knight service, and all their lands held in socage as "an estate of inheritance". Although a few further statutory adjustments were required,[4] the 1540 Act provided the basic statutory regulation of wills for three centuries.

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[1] Until the 14th century, however, only a portion of the deceased's personal property-"the deceased's part" (see note 19 below)-was distributed by will. The power to devise all personal property by will was granted by statute in York (1692) and London (1724, 11 Geo. 1, c. 18), where the old practice appears to have survived. These were, however, enactments of purely local effect. No legislation sanctioned the change in the rest of England.

[2] A.W.B. Simpson, *An Introduction to the History of Land Law*, Oxford, 1961, 176. See also R.E. Megarry, "The Statute of Uses and the Power to Devise", 7 C.L.J. 354.

[3] 32 Hen. 8, c. 1.

The *Statute of Wills* was repealed as part of the general reform of real property law in the early 19th century by the *Wills Act*, 1837.[5] The new Act replaced all earlier wills legislation, except a provision of the *Statute of Frauds* relating to disposition of estates *pur autre vie.* The only other significant statutory change in the law of wills prior to reception date was the adoption of the *Real Estate Charges Act* in 1854.[6]

The *Wills Act* was superseded at least in part even before Saskatchewan became a province. The *Northwest Territories Act* contained provisions relating to wills that were drawn primarily from the English legislation.[7] The Saskatchewan *Wills Act*, adopted in 1907,[8] was also drawn largely from the 1837 Act.

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[4] The *Statute of Wills*, 1542, 34 & 35 Hen. 8, c. 5, cleared up an ambiguity by providing that all socage lands held in fee simple could be devised, avoiding the less precise reference to estates of inheritance. The *Tenures Abolition Act*, 1660, 12 Cha. 2, c. 24 by converting knight service into common socage, extended the power of devise to all freehold estates of inheritance except estates *pur autre vie.* A provision of the *Statute of Frauds*, 1677, 29 Cha. 2, c. 3 extended the power of disposition to estates *pur autre vie.*

[5] 7 Will. 4 and 1 Vict., c. 26.

[6] (*Locke King's Act*) 17 & 18 Vict. c. 113, amended 1867, 30 & 31 Vict., c. 69. See above, pp. 46-49. In addition, the *Navy and Marines (Wills) Act*, 1865, 28 & 29 Vict., c. 72 modified the provisions of the *Wills Act*, 1837 relating to informal wills by sailors, and the *Wills Act Amendment Act*, 1861, 24 & 25 Vict., c. 114 dealt with wills made abroad.

[7] The *Northwest Territories Act*, R.S.C. 1886, c. 50, ss. 19-27.

The 1907 *Wills Act* was not identical to the received English law. The power to devise property by will was cast in more comprehensive language than in the English Act[9], and incorporated the power to devise an estate *pur autre vie*. The Saskatchewan *Wills Act* incorporated the *Real Estate Charges Act*, 1854, but only part of the amendment to that Act in 1866.[10] These variations between the Saskatchewan and English legislation at least create the suspicion that not all received wills legislation has been disposed of in Saskatchewan.

In *Re McDougall Estate*, the portion of the 1866 amendment to the *Real Estate Charges Act* left out of the Saskatchewan legislation was held to be in force.[11] This apparent oversight was corrected by re-enactment of the missing portion of the 1866 amendment in 1927[12], but it is possible that similar logic might be applied to a few other provisions contained in the received law. For example, section 6 of the 1907 Act was

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[8] S.S. 1907, c. 15; see now R.S.S. 1978, c. W-14. An amendment to *The Wills Act* in 1852 (15 & 16 Vict., c. 24, s. 1), providing guidance for determining when a will is validly executed, was incorporated in the Saskatchewan *Wills Act* (see now s. 8).

[9] In England, the estate tail could not be devised until 1925. Since estate tail was effectively abolished in Saskatchewan prior to 1907, the language of the Saskatchewan Act could be more general than its English counterpart. In addition, the 1907 Act expressly provided that devise of an estate tail converts it to a fee simple (see now s. 31).

[10] See above, pp. 46-49.

[11] [1927] 1 W.W.R. 613.

[12] S.S. 1927, c. 16.

virtually identical to section 11 of the 1837 Act, relating to informal wills by sailors and soldiers. The *Navy and Marines (Wills) Act*, 1865 placed restrictions on the power of seamen to dispose of wages and prize money by will. It is not inconceivable that those restrictions might be held to remain part of Saskatchewan law. Nevertheless, the Saskatchewan *Wills Act* was almost certainly intended to be a consolidation of the *Wills Act*, 1837 and other miscellaneous statutes relating to wills. Even if a few provisions of the received law technically remain in force, they no longer have any utility.

(ii) Devolution of Real Property

The received law relating to intestacy has also largely been superseded. At common law, real property did not devolve upon the administrator of an intestate's estate. Rather, it descended by operation of law to the heir (the lineal descendant to the nearest degree, males taking before females). The *Inheritance Act*, 1833[13] provided that real property henceforth devolved upon the administer in the same manner as personal property. The real estate was then to be distributed according to the rules of succession, which formerly applied only to personal property. Under the rules of succession, the deceased's widow and children (regardless of sex) received preference. The *Territories Real Property Act*, 1886[14] enacted a similar provision, which was re-enacted in the *Land Titles Act*, 1894,[15] and incorporated into the first provincial *Land Titles Act* in 1906.[16] The principle is now contained in *The Devolution of Real Property Act*.[17]

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[13] 3 & 4 Will. 4, c. 106. Legislation adopted in the same year as the *Inheritance Act* made real property subject to payment of the debts of a deceased (3 & 4 Will. 4, c. 104). It supplemented earlier legislation, including 11 Geo. 4 & 1 Will. 4, c. 47, "an Act consolidating and amending laws for facilitating payment of debt out of real estate". These Acts are superseded by s. 8 of the *Devolution of Real Property Act*, which provides generally that real estate is liable for the payment of debts in the same manner as personal property.

(iii) Rules of Succession

The rules of succession were first given statutory foundation in the *Statute of Distribution*, 1670.[18] Prior to the statute, succession was governed by ecclesiastical law. The decline of the ecclesiastical courts in the 16th century rendered this state of affairs unsatisfactory; it appears that a large part of the estates of intestates were appropriated by administrators appointed by the ecclesiastical courts.[19] The *Undisposed of Residues Act*, 1830[20] extended the operation of the *Statute of Distribution* to partial intestacies. Otherwise, there was no substantial change in the law of succession prior to 1870.

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[14] S.C. 1886, c. 26, s. 5.

[15] S.C. 1894, c. 28, s. 3.

[16] S.S. 1906, c. 24, s. 5.

[17] R.S.S. 1978, c. D-27.

[18] 22 & 23 Cha. 2, c. 10. The statutory scheme was amended without much change in substance by two subsequent *Statutes of Distribution* (1684), 29 Cha. 2, c. 3, and (1685), 1 Jac. 2, c. 17.)

[19] Personalty of an intestate was divided into three parts - "the widow's part", "the bairn's part" (for the children), and "the dead's part". Prior to the decline of the ecclesiastical courts, the dead's part was applied by the administrator under the supervision of the Ordinary to relief of the poor, often primarily poor relations of the

The first succession legislation in what is now Saskatchewan was contained in a Territorial Ordinance,[21] and in 1907, the Provincial *Devolution of Estates Act* was adopted.[22] Both those enactments were closely modelled on the *Statute of Distribution*. The 1907 Act also incorporated the substance of the *Undisposed Residues Act*.[23] In the result, the English law of succession has been wholly superseded in Saskatchewan.

2. PROBATE AND ADMINISTRATION

In 1857, a Court of Probate was established to take jurisdiction in probate and administration from the ecclesiastical courts. The

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deceased. It was this that was later appropriated by administrators.

[20] 11 Geo. 4, and 1 Will. 4, c. 40.

[21] O.N.W.T. 1901, c. 13. The *Statute of Distribution* was probably in force prior to the Ordinance; it was held to be in force in Alberta in 1899 in *Re Jensen* [1926] 3 W.W.R. 737 (S.C.).

[22] S.S. 1907, c. 16. The 1907 Act was superseded in 1928 by the *Intestate Succession Act*, 1928, S.S. 1928, c. 28. See now R.S.S. 1978, c. I-13.

[23] Section 20 provided that "all property, real and personal, that is not devised by will shall be distributed as if the testator had died intestate." The Act also differed from its English counterpart in providing that the entire estate of a deceased with no issue would go to his widow, rather than the half stipulated by the English Act. This change was probably inspired by a post-reception English enactment, *The Intestate's Act*, 1890.

Saskatchewan *Surrogate Courts Act*, 1907[24] was modelled on the *Court of Probate Act*, 1857.[25] Since the 1857 Act consolidated most aspects of probate practice that were deemed to require statutory sanction, little English statute law relating to probate and grants of administration remains in force in Saskatchewan.

However, the *Court of Probate Act* was not a codification. It expressly preserved the "present practice" in the ecclesiastical courts,[26] amended rather than replaced the *Administration of Estates Act*, 1798,[27] and did not repeal some other miscellaneous provisions relating to probate and administration. In addition, a further *Court of Probate Act*, 1858 was enacted. As Judge Gravel noted in *Re Maurat Estate* "our Surrogate Court Act...follows closely enough the English *Court of Probate Act* of 1857, but it does not seem to have paid much attention to the English *Court of Probate Act* of 1858."[28]

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[24] S.S. 1907, c. 10. See now *The Surrogate Court Act*, R.S.S. 1978, c. S-66.

[25] 20 & 21 Vict., c. 77.

[26] Section 29.

[27] 38 Geo. 3, c. 87.

[28] [1927] 3 W.W.R. 18 (Sask. Surr. Ct.), referring to 21 & 22 Vict., c. 95.

(i) The Court of Probate Act, 1857

While many provisions of the 1907 Act reproduced the 1857 Act word for word, there are some differences between the two apart from obvious changes to adapt the English law to the Saskatchewan procedural framework. In some cases, the provincial drafter attempted to simplify the language of the English Act, perhaps with some changes in policy, whether intentional or otherwise.[29] In other cases, parts of the ecclesiastical law not included in the English Act were codified in the Saskatchewan Act. Section 41 of the 1907 Act, for example, required the next of kin of the deceased to be "cited or summoned to see the proceedings and show cause why administration shall not be granted to the person applying therefore" where the applicant for administration is not next of kin.[30] Similarly, section 42 gave statutory recognition to the temporary grant of administration *durante absentia*.[31]

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[29] For example, section 54 of the 1907 Act combines sections 61 and 63 of the 1857 Act, and substantially abridges the wording of the English legislation. No change in substance appears to have been intended.

[30] Under English practice, when a creditor applies for administration "his right depends solely on the practice of the court, and accordingly, except in special circumstances, the grant is not made to him until all persons entitled have been cited." (14 Hals. (1st) 188, citing *Brown v. Wildman*, (1859), 58 L.J. (P & M) 54.) The English probate rules (non-contentious business), 1862, R. 37 also required an applicant for administration to depose that all persons having a prior right to the grant have been cleared.

There would appear to be only a single provision substantially affecting the rights of parties contained in the 1857 Act that was entirely omitted from the Saskatchewan legislation. Because it extended the scope of a provision first enacted in the *Administration of Estates Act*, 1798[32], it will be discussed when that Act is considered below. Otherwise, it would appear likely that the whole of the *Court of Probate Act*, 1857 has been superseded in Saskatchewan.[33]

(ii) The Administration of Estates Act, 1798

The *Administration of Estates Act*, 1798 put a statutory gloss on ecclesiastical practice in regard to two species of temporary administration - administration *durante absentia*, and administration *durante minore aetate*.

The first five sections of the Act permitted the court to appoint a temporary administrator *durante absentia* where an executor had obtained probate, but one year after the death of the deceased had not administered the estate, and was residing out of the jurisdiction. The grant could be made only for the purpose of permitting interested parties to take proceedings in equity. Ecclesiastical law made provision for appointment of an administrator *durante absentia* only prior to probate or grant of administration.[34] Section 74 of the *Court of Probate Act*, 1857 extended the power to appoint an administrator *durante absentia* to cases in which an administrator originally appointed had left the jurisdiction. Section 18 of the *Court of Probate Act*, 1858[35] removed the stipulation that the administrator *durante absentia* could be appointed to replace an executor or administrator only when there was an intention to take proceedings in equity.

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[31] At ecclesiastical law, where an executor or the next of kin of an intestate was resident out of jurisdiction, the court had jurisdiction, before probate or grant of administration, to grant adminstration to a temporary administrator during the absence of the person entitled to the grant: See *In the Goods of Cholwill* (1886), L.R. 1 P & D 192. The Saskatchewan provision applies only to temporary administration where the next of kin "usually residing in Saskatchewan... happens to be absent from the province." See also Rule 37(3) of the Rules of the Surrogate Court, providing that "A grant of administration with or without will annexed shall be made to a person resident in Saskatchewan in preference to a person having equal right residing outside Saskatchewan unless the court otherwise orders."

[32] *Supra* note 27.

[33] In addition to the sections discussed above, s. 64, which established a rule of evidence, was likely received, but replaced by a provision of the Saskatchewan *Evidence Act*. See below, p. 191.

It may be of significance that the *Surrogate Courts Act*, 1907 did not reproduce the provision of the 1857 Act relating to administrators *durante absentia*. Because much of the rest of the 1857 Act was reproduced in the Saskatchewan legislation, it is not unreasonable to assume that the omission was intentional. Section 73 of the 1857 Act gave the court a broad discretionary power to appoint an administrator other than the person ordinarily entitled to administer in "special circumstances". It also permitted the court to appoint an administrator where "the executor shall at the time of the death of such person be resident out of the United Kingdom of Great Britain and Ireland." That provision was reproduced as section 59 of the *Surrogate Courts Act*, 1907.[36] It may be that the drafters of the 1907 legislation thought that the discretion contained in section 59 was enough to deal with absent executors and administrators without also adopting section 74: if inconvenience arises, the grant to the foreign representative could be terminated, and a new appointment made under section 59. In any event, since 1907 there has been no recorded attempt in Saskatchewan to apply the administration *durante absentia* provisions in the English statutes.

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[34] See above, note 21.

[35] *Supra* note 28.

Sections 6 and 7 of the *Administration of Estates Act*, 1798 gave statutory recognition to appointment of an administrator during the minority of a person appointed sole executor. The ecclesiastical court would appoint an administrator in similar circumstances prior to 1798, but at ecclesiastical law probate could be granted to a minor who had obtained the age of 17. However, the Courts of Law and Equity would not recognize the infant executor's right to deal with the property comprised in the estate.[37] Section 6 of the *Administration of Estates Act* therefore enacted that:

> And whereas inconveniences arise from granting probate

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[36] See now s. 61.

[37] Ecclesiastical practise in regard to minors under the age of 17: *Cartright's Case* (1679), Freem. (K.B.) 258. Grants to minors of age 17: 17 Hals. 50. Refusal of Equity to pass out money to an infant executor: *Campart v. Campart* (1790), 3 Bro.C.C. 195.

> to infants under the age of 21; be it enacted, that where an infant is sole executor, administration with will annexed shall be granted to the guardian of such infant, or to such other person as the spiritual court shall think fit, until such infant shall have attained the full age of 21 years....

Appointment of an administrator *durante minore aetate* has never been a common practice in Saskatchewan. However, it would appear that section 6 of the 1798 Act provides the only substantive basis for the requirement in Saskatchewan law that probate can be granted only to an executor who is of full age. *The Surrogate Court Act* is silent on the matter, but rule 21(1)(d) of the Rules of the Surrogate Court requires the petitioner to affirm that he is of the full age of 18 years. The rules, of course, cannot be a source of the substantive law. Section 6 of the 1798 Act remains a necessary part of the law of Saskatchewan.

(iii) The Court of Probate Act, 1858

Most of the *Court of Probate Act*, 1858 was concerned with organization of the court and purely procedural matters. The provision in the Act relating to administration *durante absentia* has been discussed above. Two other provisions in the Act require consideration.

Section 16 provided that:

> Whenever an executor appointed in a will survives the testator, but dies without having taken probate, and whenever an executor named in a will is cited to take probate, and does not appear to such citation, the right of such person in respect of the executorship shall wholly cease, and the representation to the testator and the administration of his effects shall and may, without any further renunciation, go, devolve, and be committed

> in like manner as if such person had not been appointed executor.

In *Re Maurat Estate*, Judge Gravel held that provision to be in force in Saskatchewan, and applied it in a case in which only one of two executors named in a will had sought probate:

> Under the authority of that section, an executor may cite a co-executor to accept or refuse probate, either before or after he has proved himself. Since 1858, therefore, the procedure followed in England in the case of an executor who refuses or neglects to prove is by way of a citation, and the statute of that year states that if such executor does not appear he loses his right to the executorship. Our Surrogate Court Rules provide for a citation to accept or refuse probate where the executor fails to bring in a will of probate, for a citation to bring in a will, for a citation to accept or refuse administration, for a citation to bring in a grant where revocation is sought. No provision is made for the case where an executor who, either before or after having proved himself, wishes to cite his co-executor who has refused to prove.[38]

Section 16 of 1858 Act may not be necessary for the purpose to which it was put in *Re Maurat Estate.* Judge Gravel recognized that possibility. He concluded that:

> I am of the opinion that the English practice is to be followed in this case.... And if I am wrong...then I will say that there is nothing in the King's Bench Rules analogous to citation proceedings and that, consequently, I am empowered by Surrogate Rule 26 [see now rule 4] to direct the course to be pursued. I direct under the authority of that rule that the practice followed in the Probate Division in a case like this one be adopted here.

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[38] *Supra* note 28. An executor who fails to file a will for probate within 60 days after the death of the testator may be required "to appear and produce said will, and accept or refuse the probate..." under Rule 55 of the Rules of the Surrogate Court.

Rule 4 of the Rules of the Surrogate Court now provides that:

> The Rules of the Court of Queen's Bench apply with necessary modification to proceedings of the Surrogate Court except insofar as the practice and procedure is by the Act or these rules expressly provided; and where there is no analogous practice in the Court of Queen's Bench any person desiring to take a proceeding may apply to a judge for directions as to the practice to be followed in the proceeding proposed to be taken.

Section 16 of the 1858 Act is also cited by *Halsbury's Laws of England* as authority for the proposition that the chain of executorship is broken when the executor dies prior to having taken out probate.[39] However, it is probably more correct to regard section 16 as declaratory of the ecclesiastical law in this regard. At least as early as the reign of Elizabeth I, it was settled law that where "an executor dies before probate; his executor is not executor to the first testator...".[40]

While it may not be strictly necessary to have recourse to section 16 for any purpose in Saskatchewan, it may nevertheless be desirable to invoke the English Statute in some cases. *Re Maurat Estate* revealed what amounts to a loophole in the Surrogate Court rules. While the inherent jurisdiction of the court might be used to avoid a problem, section 16 provides a comprehensive and satisfactory answer to it.

Section 19 of the 1858 Act provided that until grant of administration, the estates of intestates "shall be vested in the judge of the court of probate." The provision was probably thought necessary because under ecclesiastical law, estates vested in the Ordinary. As a practical matter, however, it is useful to vest estates in the court only to ensure that someone will have responsibility for the estate if no one seeks administration in a reasonable time after the deceased's death. Section 19 and its ecclesiastical analogue provided foundation for the practice of appointing court officers to administer when no one else was available.

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[39] 14 Hals. (lst) 194.

[40] *Istead v. Stanley*, 3 Dyer 272A. See also, *Fowler v. Richards* (1828), S.C. 6 L.J. Ch. (O.S.) 185.

The Saskatchewan *Surrogate Courts Act*, 1907 provided for the appointment of Official Administrators. Section 74[41] provided that:

> When any person dies whether testate or intestate [and his estate has]...not been taken possession of by his executors or next of kin the Official Administrator... is hereby empowered and it shall be [his] duty...to forthwith take possession...pending [grant of probate or administration].

Section 75 provided that the Official Administrator could be granted administration in appropriate cases.[42] The statutory office of Official Administrator makes section 19 of the 1858 unnecessary and inappropriate in Saskatchewan. In *Re Godard Estate*,[43] the Manitoba Court of Appeal rejected a grant of administration to a court official under what it described as "the old chancery practice" because the office of Official

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[41] See now s. 81.

[42] See now s. 82.

[43] (1952), 6 W.W.R. (N.S.) 80.

Administrator made that practice redundant.

(iv) Miscellaneous Provisions Relating to Probate and Administration

In addition to the legislation discussed above, Parliament adopted a number of piecemeal provisions relating to probate and administration that were not incorporated into the Court of Probate Acts. Although most of these provisions appear to have been merely declaratory of the common law, or to have been superseded (without formal repeal) by later legislation, many of them were reproduced in the British Columbia *Administration Act* in 1911.[44]

For example, chapter 19 of the *Statute of Westminster Secundus*, 1285[45] provided that an administrator is to pay the debts of the deceased in the same manner as an executor pays debts. Such a provision may have been thought necessary because of the transgressions committed in the ecclesiastical courts in regard to intestacies. In any event, the provision would hardly seem necessary today. Sections 76 and 77 of *The Surrogate Court Act*, while not repeating the 1285 legislation in so many words, clearly recognize an obligation on both administrators and executors to pay debts after publication of a notice to creditors.

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[44] R.S.B.C. 1911, c. 4. The legislation is essentially a compilation of English Statutes believed to be in force in British Columbia by the Revision Commissioners.

[45] 13 Edw. 1, Stat. 1, c. 19.

A statute of Henry VIII[46] provided that when executors are given real property upon a trust for sale, and some of the executors renounce, the remaining executors may act. Section 66 of *The Surrogate Court Act* now provides that when an executor renounces, his rights as executor cease entirely.

The *Common Law Procedure Act*, 1852[47] provided that in an action involving an estate, the court could, in its discretion, join the personal representative as a party. This was an essentially procedural provision, repealed in England by the *Statute Law Reform Act*, 1875. Its substance is now contained in Queen's Bench Rules 60 and 61.

It was not uncommon for medieval legislators to adopt statutes essentially declaratory of the common law. A statute of Edward III,[48] for example, provided that executors of executors have the same rights and liabilities as those they replace. It is likely that the statute was not intended to give sanction to the doctrine of the chain of executorship, but rather to make it clear that a new executor was in the same position as the old when he took his title from the doctrine. In any event, the statute of Edward III is not mentioned as part of the foundation of the doctrine in any modern authority. In *Re Land Titles Act* (*Whitman's Case*), it was held that by application of the "common law of England", an executor taking title under the doctrine was authorized to deal with property within the land titles system.[49]

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[46] (1529), 21 Hen. 8, c. 4.

[47] 16 & 17 Vict., c. 86, s. 44.

[48] 25 Edw. 3, Stat. 5, c. 5.

Even as late as the reign of William IV, a statute declaratory of a long-established common law principle relating to administration was adopted. It gave statutory recognition to the doctrine of relation back, under which an administrator's title is dated back to the date of the intestate's decease.[50] The statute is not referred to in Halsbury's discussion of the doctrine of relation back, and he cites cases in support of the doctrine which antedate the statute.[51]

The status of some other species of personal representative was apparently regarded as vague enough under ecclesiastical and common law to attract clarifying legislation. A statute in the reign of Charles II, for example, specifically provided that administrators *de bonis non* could enforce judgments obtained by a previous personal representative by execution.[52] Whether or not the provision was necessary in the seventeenth century, it would appear to be unnecessary today. In modern practice, a grant of administration *de bonis non* has been assimilated to the ordinary grant.[53]

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[49] [1919] 1 W.W.R. 600 (Sask.). See also 14 Hals. (1st) 141.

[50] 3 & 4 Will. 4, c. 27.

[51] 14 Hals. (1st) 146, citing *R v. Horsley* (inhabitants) (1807), 8 East 405.

[52] 17 Cha. 2, c. 8, s. 2.

Executors and administrators *de son tort* attracted attention in an era when record-keeping was less sophisticated than at the present, creating more opportunities for persons who had not been appointed to act as personal representative to intermeddle in the administration of estates. Statutes of Charles II and William and Mary[54] provided that executors and administrators *de son tort* were liable to carry out the duties of personal representatives according to the law, and to account for their administration. These provisions were essentially declaratory of the common law and equity. At least as early as *Coulter's Case* in 1599, the liability of executors and administrators *de son tort* was recognized by the courts.[55] No modern authority on executors and administrators *de son tort* makes reference to these statutes.[56]

A statute of Elizabeth I[57] relating to administration *de son tort* cannot be so easily dismissed, however. It provided that where a grant has been "wrongfully or fraudulently" procured, the person who procured the grant is chargeable as an executor *de son tort*. The statute appears to have extended the common law by recognizing a new category of executor *de son tort*. Apart from the statute, an executor *de son tort* is one who intermeddles in the administration of an estate without having been appointed executor or administrator. Halsbury recognized the Elizabethan statute as an essential part of probate law as late as 1910.[58] A similar provision, relating to the effect of "erroneous grants" is contained in the Ontario *Surrogate Court Act*.[59] The Elizabethan statute remains a necessary part of the law of Saskatchewan. However, contemporary policy would be better served by adoption of a provision relating to erroneous grants generally modelled on the Ontario provision.

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[53] See Surrogate Court Rule 2(d), which provides that "grant" includes letters of administration *de bonis non*.

[54] 30 Cha. 2, stat. 1, c. 7, and 4 Will. & Mar., c. 24, s. 12.

[55] (1599), 5 Co. Rep. 30.

[56] See, for example, 14 Hals. (1st) 149, and *Pickering v. Thompson* (1911), 24 O.L.R. 378 (Ont. C.A.).

[57] (1601), 43 Eliz. I., c. 8.

(v) Priority of Right to Administer

Legislation governing priority in appointment of administrators has a longer history than probate legislation. Because the ecclesiastical courts permitted the administrator to appropriate a part of the estate to himself, Parliament intervened to establish a system of priorities at an early date. The *Intestate Estates Administration Act*, 1357 provided that:

> Item, it is accorded and assented, that in case where a man dies intestate, the Ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods.

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[58] See 14 Hals. (1st) 147, citing the definition of executor *de son tort* in Went. Off. Ex., 14th ed., p.320

[59] R.S.O. 1980, c. 512, s. 47.

According to Halsbury, the ecclesiastical courts regarded the husband of a deceased woman as her "next and most lawful friend".[60] This right was confirmed by a provision attached to the *Statute of Frauds*, 1677[61]. By the 16th century, a more comprehensive direction to the ecclesiastical courts appeared to be necessary. That direction was provided by the *Probate Fees Act*, 1529[62]. Under the 1529 Act, the widow and next of kin were given an equal right to administer, the court having a discretion to make a grant to either or both, and in the case of several next of kin, the court had a further discretion to accept any one or more of them. In practice, the grant was made to the widow unless sufficient cause could be shown to the contrary.[63] Considerable case law developed governing the exercise of the discretion, and by the 19th century, it was settled law that if none of the persons entitled were willing to take out administration, a creditor might be appointed.[64]

Although the *Court of Probate Act*, 1857 extended the discretionary powers of the court to grant administration, it did not displace the older law. Halsbury was able to summarize the law as it existed after 1857 in this manner:

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[60] 31 Edw. 3, stat. 1, c. 11; 14 Hals. (1st), para. 388.

[61] 29 Cha. 2, c. 3, s. 24.

[62] 21 Hen. 8, c. 5, ss. 3-4.

[63] *Stretch v. Pynn* (1752), 1 Lee 30.

[64] *Webb v. Needham* (1823), 1 Add. 494. The *Chancery Procedure Amendment Act*, 1852, 15 & 16 Vict., c. 86 provided for grants of administration to creditors and legatees in a "summary" manner, but this appears to have been of purely procedural effect.

> There are certain persons recognized by law as being entitled to administer in priority to others, and in the absence of any grounds for the exercise of its discretionary power, the court has regard to these rights in making a grant.[65]

Saskatchewan law is in much the same state as the English law in 1857. The Statutes of Edward III and Henry VIII remain part of Saskatchewan law.[66]

The Rules of the Surrogate Court now set out priorities. Rule 36 provides that:

> Where the deceased dies wholly intestate, the priority of right to a grant of administration shall be as follows:
>
> (a) husband or wife;
> (b) children;
> (c) grandchildren, or any other issue of deceased taking *per stirpes*;
> (d) father and mother;
> (e) brothers and sisters of the whole blood or half blood;
> (f) issue of the deceased's brothers and sisters of the whole or half-blood;
> (g) grandparents;
> (h) uncles and aunts of the whole or half blood;
> (i) next of kin in equal degrees of consanguinity;
> (j) creditors;
> (k) the Crown.

Rule 28 sets out a similar list for application where the deceased dies leaving a will and an administrator is appointed with will annexed. The Rules deal with what is essentially substantive law. To the extent that they are supported by statute, that support can only come from the legislation of Edward III and Henry VIII. While the rules would appear to be more or less in conformity with the received law, the identity may not be complete. For that reason, it would be desirable to replace the surrogate court rules with a statutory system based on the modern practice.

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[65] *Supra* note 58, at 182-183.

[66] The *Probate Fees Act*, 1529 was assumed to be in force in *Re Krause Estate*, [1929] 1 W.W.R. 896 (Sask. Surr. Ct.).

(vi) Resealing Letters Probate

The *Colonial Probate Act*, 1892[67] provided for resealing in the United Kingdom of grants of probate and administration made in any "British possession" specified by Order-in-Council. Upon resealing, the colonial grant was of "like force and effect" as if it had been made in the United Kingdom.

Section 1 stated that Orders-in-Council made under the legislation would determine the British possessions to which the Act would "apply". Nevertheless, the Act cannot be regarded as in force *proprio vigore* in the usual sense. Resealing affected only the jurisdiction of United Kingdom courts, permitting administration of assets in the United Kingdom without obtaining an English grant for that purpose. It was clearly intended that resealing in the colonies would be governed by local legislation.

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[67] 55 & 56 Vict., c. 6, amended before the *Statute of Westminster* by the *Colonial Probates (Protected States and Mandated Territories) Act*, 1927, 17 & 18 Geo. 5, c. 43. The amendment did not apply to Canada.

Provision for resealing was contained in the Territorial *Judicature Ordinance*, and was included in *The Surrogate Courts Act*, 1907.[68] There has never been any question that this legislation, together with applicable rules of court, provides a complete code in regard to resealing in the province. In *Re George Estate*,[69] it was suggested by counsel that certain aspects of English practice might be applicable to resealing in Saskatchewan. McNiven J. held, however, that:

> It is true that application for resealing can be made in England under Rule 92 N.C.B., passed to carry out the provisions of the *Colonial Probate Act*, 1892.... Our rules 8 and 14 as to procedure and material to be supplied on applications for resealing would supplant any application that Rule 92 N.C.B. might have had in this province.

3. TRUSTS

Like the law of wills, the law of trusts cannot be easily separated from real property law. The modern trust grew out of the *Statute of Uses*, and the reforms of real property law in the early 19th century affected trusts as well as legal interests in land. It was not until the last half of the 19th century, however, that legislators specifically addressed trust law. It is not surprising that reform was delayed. As Professor Donovan Waters has written:

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[68] *Supra* note 24, ss. 70-72. See now ss. 78-80.

[69] [1945] 3 W.W.R. 520 (Sask. K.B.).

> The 17th century was...the beginning of the era of the great landed estates, the sons of which for three centuries ruled England at every level of government. These great estates, and many lesser ones, only began to break up in the 19th century under the impact of the Industrial Revolution and agricultural depression, with their effect on the economic and commercial life of the country. Such a long history had its own effect upon the trust, for the trust was the traditional device for tying up land for the benefit of successive generations of the family.[70]

Legislators dared not interfere with the settlement, the trust mechanism devised by lawyers in a service of the land-owning classes. Although trusts were infected with the complexities typical of unreformed real property law, "...the property owning classes saw that the system could be made to work, at a price, and realized the system of *primogeniture* enshrined in the strict settlement was the very basis of their way of life." It was not until "the political influence of the country land-owning classes diminished, and there was in consequence a better chance for reforming measures" that legislative intervention was possible.[71]

Reform of trust law proceeded in two directions. First, the *Trustee*

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[70] D.W.M. Waters, *The Law of Trusts* (2nd ed.), Toronto, 1984, 7-8.

[71] Simpson, *supra* note 2, at 253.

Act, 1860 and related legislation,[72] made the trust a more attractive mechanism for purposes other than family settlements. Complicated as they were, settlements had been reduced to a series of formulae known well enough to conveyancing lawyers. Adapting the formulae to other purposes was difficult, however, because prior to adoption of the Trustee Acts, trustees possessed only the powers and authority expressly granted to them by the terms of the trust document. The *Trustee Act*, 1860, more fully entitled "An Act to give trustees, mortgagees and other certain powers now commonly inserted in settlements, mortgages and wills", made it unnecessary to include so much detail in trust documents.

Second, Victorian legislators focused directly on the institution of the settlement. In the typical settlement, the trustees played a nominal role; control of the property rested with the "first beneficiary", the head of the family for the time being. According to Waters:

> Each generation of father and eldest son would together wind-up the existing trust, and settle the property anew upon the existing and new generations. Two beneficiaries of the trust...could bring all beneficial interests into their hands, demand the property from the trustees, and then as settlors once again transfer property to trustees

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[72] 23 & 24 Vict., c. 145. See also the *Trustee Relief Act*, 1847, 10 & 11 Vict., c. 96, and the *Law of Property and Trustees Relief Amendment Act*, 1859, 22 & 23 Vict., c. 35. Legislation in this category is conveniently set out in the Schedule of the *Trustee Act*, 1893, 56 & 57 Vict., c. 53.

> for new family objects.[73]

A series of Settled Estates Acts[74] from 1856 to 1882 brought theory and practice into closer conformity:

> So typical trustee's powers, for example, of sale and leasing, began to be conferred statutorily upon the first beneficiary and ultimately by the end of the 19th century the first beneficiary was exercising almost all the powers of a trustee.[75]

It should be noted that neither aspect of the reform of trust law was complete in England prior to reception date. The *Trustee Act*, 1893[76] consolidated and extended earlier trustee legislation. The *Settled Estates Act*, 1882 completed the evolution of the law of settlements in the 19th century.[77] Changes in English trustee legislation after 1870 were reflected in the Saskatchewan *Trustee Act*. The law relating to settlements, if it was received in Saskatchewan at all, remains as it was at reception date.

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[73] *Supra* note 70, at 8.

[74] (1856), 19 & 20 Vict., c. 120; (1858), 21 & 22 Vict., c. 77; (1864), 27 & 28 Vict., c. 114; (1882), 45 & 46 Vict., c. 38.

[75] *Supra* note 70, at 8.

[76] *Supra* note 72.

[77] *Supra* note 74.

(i) Trustee Legislation

The Saskatchewan *Trustee Act*[78] was based on a Territorial Ordinance,[79] which in turn was modelled on the 1893 English Act. It would seem logical to assume that the Territorial Ordinance of 1903 was intended to replace received trustee legislation. Although the Ordinance did not expressly repeal the English statutes, its English model did repeal its predecessors.[80]

Nevertheless, some provisions of the 1860 *Trustee Act* were held to be in force in Manitoba, operating "cumulatively" with the provincial *Trustee Act*.[81] However, the Manitoba legislation is not as complete a consolidation of the English law as the Saskatchewan *Trustee Act*. The provision in the 1860 Act held to be in force in Manitoba is paralleled by a provision of the Saskatchewan legislation.[82] It would appear to be safe to conclude that received trustee legislation has been wholly superseded in Saskatchewan.

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[78] R.S.S 1909, c. 46, see now R.S.S. 1978, c. T-23.

[79] O.N.W.T. 1903 (2nd sess.), c. 11. The first Saskatchewan *Trustee Act* was identical in substance.

[80] See the Schedule of the 1893 Act. The *Trustee Relief Act*, 1847 and the *Trustee Relief Amendment Act*, 1859 were repealed directly by the 1893 Act. The *Trustee Act*, 1860 was replaced by the *Conveyancing of Law and Property Act*, 1881, 44 & 45 Vict., c. 41, the relevant portions of which were repealed in turn by the 1893 Act.

[81] *Re Nanton Estate*, [1948] 2 W.W.R. 113 (Man. K.B.).

[82] Section 26 of the 1860 Act empowered trustees to apply trust income to maintenance and education of infant beneficiaries. The Manitoba Act did not contain a similar provision. A similar provision was also contained in the *Conveyancing of Law and Property Act*, 1881, 44 & 45 Vict., c. 41, s. 43, and was incorporated in the Territorial Ordinance of 1903 (s. 24). See now s. 52 of the Saskatchewan *Trustee Act*.

(ii) Settlements

Settlements on the English model were popular for a time in southern Ontario, parts of British Columbia, and New Brunswick.[83] But even in those areas, the settlement was always rare. Professor Waters writes:

> The concept came to Canada from England but the social and economic conditions which favoured its growth and popularity in England had already begun to change when circumstances in part of Canada during the middle of the 19th century encouraged its growth in this country.... The settlement of land upon a family for successive generations was no longer such an attractive device after the First World War, and after the Second World War it could be disastrous. The social and economic conditions which provide its substratum had gone, and steep rates of taxation and estate duty gave it the potential for disaster. In Canada, the settlement has merely faded away.[84]

Nevertheless, the *Leases and Sales of Settled Estates Act*, 1856 was held to have been received in Saskatchewan in a 1955 decision, *Re Moffat Estate*.[85] If the 1856 legislation is in force, it is also likely that the Settled Estates Acts of 1858 and 1864 were also received. In *Re Moffat Estate*, land was devised in trust for the testator's widow for life, with remainder to two sons. Mr. Justice McKercher held that the trusts constituted a settlement within the scope of the 1856 Act. Oil wells had been opened on the land, and the widow and sons had agreed to lease the rights to the oil. *The Leases and Settled Estates Act* authorized the courts to approve the lease, even though the terms of the trust did not expressly permit it.

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[83] Waters, *supra* note 70, at 888.

[84] *Supra* note 70, at 888. The existing Canadian legislation, modelled primarily on the English *Settled Estates Act*, 1877 is the *Land (Settled) Estate Act*, R.S.B.C. 1979, c. 215, The *Settled Estates Act*, R.S.O. 1980, c. 468, and the *Trustee Act*, R.S.N.B. 1973, c. T-15, ss. 44-8.

[85] (1955), 16 W.W.R. 314 (Sask. Q.B.).

The 1856 legislation was intended to remove some of the fetters on alienation of settled land that had proved to be inconvenient in the 19th century. It permitted life tenants to make leases for up to 21 years' duration, and permitted, with the court's approval, both sale and partition of settled lands, and the granting of longer term leases for agricultural, mining and building purposes. The 1858 and 1864 legislation added some additional refinements, but did not alter the basic policy of the 1856 Act.

In general, it is doubtful that the powers conferred on trustees and beneficiaries by settled estates legislation were ever necessary or desirable in Saskatchewan. It was only the complexity of the traditional settlement that made such legislation necessary in England. The decision in *Re Moffat Estate* did not point so much to the utility of the English legislation in Saskatchewan as to special problems associated with petroleum and mineral leases. In 1960, the *Trustee Act* was amended, perhaps in response to the decision in *Re Moffat*, to give judges of the Court of Queen's Bench the power to authorize "a trustee to lease, grant a profit a prendre in respect of or otherwise deal with or dispose of mines and minerals or sand and gravel forming part of the trust estate...".[86] The received legislation can be regarded as superseded in that respect.

While it is true that a settlor might still create a trust arrangement that would attract application of the *Settled Estates Act*, unreasonable limits on the powers of trustees to sell or lease property are now more appropriate matters for an application under *The Variation of Trusts Act*. Adopted in 1969, the Act permits modification of trusts with court approval in any circumstances in which it is in the interests of the beneficiaries to do so.[87] It is unlikely that the *Settled Estates Acts* would be of much utility in Saskatchewan at present, even if they remain technically in force.

4. RELATED LEGISLATION

(i) The Definition of Charity

The law does not contain a succinct definition of charitable purpose. When the term is used to describe the reason a gift or bequest is made, the courts must refer to the case law to determine whether a valid charitable purpose is disclosed.[88] At the root of much of the case law lies the preamble to the *Charities Act*, 1601.[89] Judicial interpretation of the preamble has led the courts to identify four categories of charity - the relief of poverty, the advancement of education, the advancement of religion, and other purposes beneficial to the community.[90] It is unlikely that the 1601 statute itself will be consulted to determine whether a particular bequest is charitable in character, though it has been referred to in a reported Saskatchewan decision.[91] Nevertheless, the Statute provides the foundation for the authorities that the court will rely on in practice.

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[86] S.S. 1960, c. 11, s. 1. See now, the *Trustee Act*, ss. 42 and 43. The provisions also provided for apportionment of rents and royalties between beneficiaries.

[87] See now R.S.S. 1978, c. V-1.

[88] See the discussion of the charitable trust in Waters, *supra* note 70, at 501-642.

(ii) Accumulations

The *Accumulations Act*[92], which places limits on the time during which income may be accumulated in a trust, has been held to be in force in Saskatchewan.[93] Accumulations legislation was enacted in Ontario in

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[89] 43 Eliz. 1, c. 4.

[90] *Tax Commissioners v. Pemsel*, [1891] A.C. 531, summing up the result of several centuries of accumulated case law.

[91] *Re Patriotic Acre Fund*, [1951] 2 D.L.R. 624 (Sask. C.A.), which also referred to the *Pemsel* case.

[92] 1800, 39 & 40 Geo. 3, c. 98.

[93] *Re Fossum Estate* (1960), 32 W.W.R. 372 (Q.B.); referred to with approval in *Re Hume* [1983] 4 W.W.R. 728 (Sur. Ct.). See also *Fonseca v. Jones* (1960), 35 W.W.R. 143 (Man. Q.B.) and *Re Burns Estate* (1958), 26 W.W.R. 49 (Alta. Q.B.) holding the statute to be in force in the other prairie provinces.

1879,[94] and in British Columbia.[95] The policy underlying the legislation is suspect, however. It appears to have been adopted out of fear that "blind trusts" would become black holes into which much of the wealth of the nation would fall.[96] Tax considerations, if nothing else, would now prevent that result. The *Accumulations Act* has been repealed in Alberta[97], Manitoba[98] and British Columbia.[99] The Saskatchewan Law Reform Commission has recommended repeal of the legislation in its report on perpetuities and accumulations.[100]

(iii) Powers of Appointment

The rules governing the formalities to be observed in the creation and exercise of powers of appointment were modified incidentally prior to the post-reception *Powers of Appointment Act*, 1874.[101] The *Wills Act*, 1837 provided that exercise of a power of appointment by will is valid if the ordinary formalities required for execution and attestation of a will have been complied with, even if the terms of the power of appointment required it to be exercised in some other manner.[102] The Saskatchewan *Wills Act* contains a similar provision.[103] The *Law of Property Amendment Act*, 1859 extended the same ameliorative approach to powers of appointment exercised by deed. Under the Act, any power of appointment may be exercised by adhering to the formalities ordinarily required in a deed.[104] The provision is unnecessary when a power of appointment is exercised by a transfer within the land titles system,[105] but could apply in anomalous cases in which a power is exercised without registration of a transfer.

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[94] R.S.O. 1980, c. 5.

[95] The *Perpetuities Act*, S.B.C. 1975, c. 53.

[96] See W. Holdsworth, *History of English Law*, vol. 7, London, 1903, 203. The immediate inspiration for the legislation was a decision upholding the will of a certain Peter Thellesson made with the object of accumulating an enormous fortune for the benefit of future and unascertained members of his family. It provided that the income arising from his land should be accumulated for three generations, and on the death of the last survivor of the third generation, divided among the surviving members of the fourth. It was predicted that the trust would last 70 or 80 years and produce capital and interest of approximately 100 million pounds.

[97] R.S.A. 1980, c. P-4.

[98] *The Perpetuities and Accumulations Act*, S.M. 1982-83-84, c. 43.

[99] *Perpetuity Act*, R.S.B.C. 1979, c. 321.

[100] *Proposals Relating to the Rules Against Perpetuities and Accumulations* (June, 1987).

The *Illusory Appointments Act*, 1830[106] was also intended to provide some relief for grantees of powers. At law, when a power of appointment required shares to be appointed to each of the members of a class, appointment of a nominal share to one or more members of the class was sufficient to comply with the terms of the power. Equity, however, declared such an exercise of the power to be invalid. The 1830 legislation adopted the rule at law for application in both the courts of law and equity.

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[101] (Lord Selborne's Act) 37 & 38 Vict., c. 37.

[102] *Supra* note 5, ss. 9-10.

[103] *Supra* note 8, s. 9.

[104] 22 & 23 Vict., c. 35, s. 12.

[105] *The Land Titles Act*, R.S.S. 1978, c. L-5, s. 257 provides that "notwithstanding any statute or rule of law, any transfer...may be duly made by an instrument not under seal, and if so made the instrument...shall be of the same force and effect for all purposes as if it were made under seal."

[106] 11 Geo. 4, and 1 Will. 4, c. 46. The provision remains in force in England as s. 158 of the *Law of Property Act*, 1925.

To a modern lawyer who knows nothing of the contest between the common law and equity in regard to powers of appointment, the statute would seem to be an irrelevancy. In practice, the position taken by equity can be safely forgotten. Nevertheless, a strict application of the doctrine of reception requires that the 1830 *Act* remain part of the law of Saskatchewan.

SUMMARY - STATUS OF LEGISLATION CONSIDERED

1. ACTS OR PROVISIONS OF ACT THAT HAVE BEEN FOUND TO BE OR LIKELY ARE IN FORCE AS PART OF PROVINCIAL LAW, AND REMAINING ESSENTIAL.

   Intestate Estates Administration Act, 1357**

   Probate Fees Act, 1529, ss. 3-4* **

   Stat. Eliz. I., 1601, c. 8.

   Charities Act, 1601, preamble*

   Administration of Estates Act, 1798, ss. 6-7**

   Accumulations Act, 1800*

   Illusory Appointments Act, 1830

   Court of Probate Act, 1858, s. 16*

   Law Of Property Amendment Act, 1859, s. 12

2. ACTS OR PROVISIONS OF ACTS THAT HAVE BEEN FOUND TO BE OR MAY BE IN FORCE, BUT ARE NOW OF LITTLE OR NO UTILITY.

   Administration of Estates Act, 1798, ss. 1-5

   Settled Estates Acts, 1856, 1858, 1864*

   Court of Probate Act, 1858, s. 18

   Navy and Marines (Wills) Act, 1865

3. ACTS OR PROVISIONS OF ACTS THAT HAVE BEEN FOUND NOT TO BE IN FORCE, OR THAT ARE LIKELY NOT IN FORCE, BUT CONSIDERED IN THE TEXT.

   Stat. 25 Edw. 3, Stat. 5, c. 5

   Stat. 30 Car. II, Stat. 1, c. 7 and *4 W & M*, c.24, s. 12

   Stat. 3 & 4 Will. 4, c. 27

   Court of Probate Act, 1858 [except as otherwise noted above]

   Colonial Probate Act, 1892***

4. ACTS OR PROVISIONS OF ACTS THAT WERE HELD TO BE RECEIVED, OR WHICH WERE LIKELY RECEIVED, BUT SUPERSEDED BY SIMILAR SASKATCHEWAN LEGISLATION.

Statute of Westminster Secundus, 1285, c. 19

Stat. Henry VIII, 1529, c. 4

Statutes of Distribution, 1670, 1684, 1685*

Undisposed of Residues Act, 1830

Inheritance Act, 1833

Stat. Will. 4, 1833, c. 106

Wills Act, 1837

Trustee Relief Act, 1847

The Common Law Procedure Act, 1852, s. 44

Real Estate Charges Acts, 1854 and 1866*

Court of Probate Act, 1857 [except as otherwise noted below]

Court of Probate Act, 1858, s. 19

Law of Property and Trustee Relief Amendment Act, 1859

The Trustee Act, 1860

* Held to be in force by a Saskatchewan Court.

** Required as statutory support for a rule of Court.

*** Held not to be in force by a Saskatchewan Court.

CHAPTER IV

COMMERCIAL LAW

1. BACKGROUND

Traditional contract and commercial law is almost entirely judge-made. Until the 18th century, enforcement of commercial agreements was governed by the law merchant, administered by mercantile courts. Special statutes were enacted to regulate and protect trade,[1] but until the rise in overseas commerce and imperial trade policy, the legislation was usually of a local character. The wool trade, for example, was a mainstay of the medieval commercial economy, and therefore, of the Royal Treasury. It attracted a series of regulatory enactments in the Middle Ages.[2] Principles, however, were left to the *lex mercatoria*.

During the 17th and 18th centuries, mercantilist economic policy was reflected in legislation creating monopolies and restrictive trading practices. Much of the legislation was in force *proprio vigore* throughout the Empire,[3] but none survived the decline of mercantilism and the rise of free trade.[4] Thus when the law merchant was assimilated to the common law, there was little statutory law to gloss it.[5]

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[1] R.M. Goode, *Commercial Law*, Harmondsworth, 1982, 32. Goode mentions, in addition to the statutes in note 2, the *Carta Mercatoria*, 1303 (speedy justice for foreign merchants) (apparently equivalent to 13 Ed. 1 Stat. Merc.), and the *Statute of Acton Burnell*, 1283 (enrollment of promissory notes). Statutes regulating various trades and trading in specified commodities accounted for a large part of the legislative output from an early date. In the relatively brief reign of Edward IV, for example, the following statutes were enacted: 3 Edw. 4 (imports and exports); 4 Edw. 4 (cloth); 7 Edw. 4 (worsteds); 8 Edw. 4 (cloth); 12 Edw. 4 (bowstaves, wool, etc.); 14 Edw. 4 (wool); 17 Edw. 4, c. 1 (currency), c. 4 (tiles), c. 5 (cloth); 22 Edw. 4, c. 4 (price of bows); c. 5 (fulling mills).

[2] E.g. The *Statute of Staples*, 27 Edw. 3, st. 2 (1353).

Virtually the only legislation now regarded as "commercial law" adopted before the beginning of the 19th century that remains part of the law of Saskatchewan is legislation more closely connected in its origin with real property than commercial transactions. The *Fraudulent Conveyances Act*, 1570[6] and the *Statute of Frauds*[7] are now conventionally classified as debtor-creditor and contract law respectively. Both, however, were originally designed to combat the inadequacies of traditional methods of conveying real property.[8]

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[3] The *Navigation Act*, 1660, 12 Cha. 2, c. 18, restricting carriage of goods by foreign vessels, was a cornerstone of mercantilism. More specific legislation restricting freedom of trade and contract in the interests of national policy included the *Trade to the East Indies Acts*, 1720, 7 Geo. 1, st. 1, c. 21; 1797, 37 Geo. 3, c. 117 ("An Act for the further preventing of His Majesty's subjects from trading to the East Indies under foreign commissions, and for encouraging and further securing the lawful trade thereof").

[4] See *The India* (1864), 33 L.J. Adm. 193, in which it was held that the *China and India Trade Act*, 1833, 3 & 4 Will. 4, c. 93 impliedly repealed all restrictions on the East India trade because the old legislation was inconsistent with contemporary policy embodied in the 1833 Act.

[5] *Goode*, *supra* note 1, at 33 credits Cooke with the first efforts to discredit the law of merchant in favour of the common law. Chief Justice Holt and Lord Mansfield "reduced the vast mass of case law of commercial disputes to an ordered structure" by assimilating the law of merchant to the common law in the late 18th century.

[6] 13 Eliz. 1, c. 5.

[7] (1677), 29 Cha. 2, c. 3.

Nineteenth century legislators were not much more inclined to re-examine the principles of contract law than their predecessors. Freedom of contract was accepted as a guiding principle. Lord Jessel recorded the opinion that:

> If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily shall be held sacred....[9]

Thus, as Goode notes, "[F]or a long time commercial transactions were sheltered from the statutory intervention that was a growing trend in relation to other fields of human activity."[10] Nevertheless, during the last half of the 19th century, commercial law did attract the attention of the "vigorous legislation"[11] of Victorian Parliaments.

Commercial law was indirectly, but nonetheless fundamentally, influenced by modernization of civil procedure in the 19th century. Abolition of the forms of action[12] freed contract law from procedural fetters, and procedural statutes virtually remade the law of debtor-creditor. The *Common Law Procedure Act* of 1854 provided for examination of judgment debtors and attachment of debts.[13] Similarly, the *Judgment Acts* of 1838 and 1840 remade the ancient and largely ineffective writs of *fieri facias* and *elegit* into the modern writs of execution,[14] and the *Small Debts Act*, 1845 created a system of exemptions.[15] Imprisonment for debt was curtailed (but not abolished) by the *Debtors Act*, 1869.[16]

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[8] See above, pp. 81-83. Discussed below, p. 146 ff.

[9] *Printing & Numerical Registering Co. v. Sampson* (1875), L.R. 19 Eq. 462. See generally, P.S. Aityah, *The Rise and Fall of Freedom of Contract*, Oxford, 1979.

[10] Goode, *supra* note 1, at 41.

[11] Maitland, *Constitutional History of England*, Cambridge, 1919, 20.

[12] See below, p. 218.

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[13] 17 & 18 Vict., c. 125, ss. 60-66. Earlier legislation providing for examination of debtors was often draconian. The "Lords Act" (1758) 32 Geo. 2 c. 28, amended 26 Geo. 3, c. 44, 39 Geo. 3., c. 50 provided a penalty of transportation for 7 years for failure to attend for examination. It was repealed by the *Statute Law Revision Act*, 1867.

[14] 1838, 1 & 2 Vict., c. 110; 1840, 3 & 4 Vict., c. 82; *fieri facias* was a creation of the courts, but *elegit*, upon which seizure of realty was based, was created by the *Statute of Westminister II*, 1285, 13 Ed. 1, cc. 18 and 45, which also legislated with regard to *fieri facias*. Although held in force in a 19th century Nova Scotia decision, *Caldwell v. Kinsman* 2 N.S.R. 398, and left unrepealed after the *Judgments Acts* were adopted, these enactments can be regarded as essentially obsolete after 1838. Some other miscellaneous statutes relating to execution were not repealed until after reception date (e.g. 17 Car. 2, c. 8; 16 & 17 Car. 2, c. 5; 22 & 23 Car. 2, c. 2) but were rendered effectively obsolete by the *Judgments Acts*. In Canada, the writ of *fieri facias* was extended to real property by "An Act for more easy recovery of debt in His Majesty's Plantations and Colonies in America", 1732, 5 Geo. 2, c. 7. The Act was in force *proprio vigore*, and thus was effectively repealed by the Imperial Parliament by the *Statute Law Revision Act*, 1887. See Dunlop, *infra* note 19, at 135.

[15] 8 & 9 Vict., c. 127. See also the *Wages Attachment Abolition Act*, 1870, 33 & 34 Vict., c. 30 (assented to July 14, 1870), exempting wages of some classes of workers from attachment.

[16] 32 & 33 Vict, c. 62. The *Debtor's Act* superseded a long development in law and equity, assisted in part by statute law, which permitted arrest of the debtor. At law, the arrest was the ordinary method of initiating the action for debt, a practice rooted in the Statute of 25 Ed. 3, c. 17, but modified by several later enactments.

The *Debtor's Act* retained imprisonment for absconding debtors among others, and after adoption of the post-reception *Absconding Debtors Act* 1870, 33 & 34 Vict., c. 76 imprisonment was continued. Practice in Saskatchewan was governed by the Rules of

Despite the procedural format of this legislation, it is likely that it was received as part of the law of Saskatchewan. Parts of the *Judgments Acts*, for example, were held in force in the province in 1917[17], and as late as 1961, a gap in British Columbia executions legislation was filled by relying upon the English legislation.[18] The Saskatchewan *Executions Act*, however, contains the provisions of the 1838 and 1840 Acts omitted in British Columbia.[19] Adopted in 1918-19, shortly after the courts had concluded that the *Judgments Acts* were received in the province, it amounted to a virtual re-enactment of the English legislation.[20] The *Debtors Act* was expressly declared to be no longer in force in Saskatchewan in 1918-19.[21] There can be little doubt

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Court (Order 38, 1911), until a provincial *Absconding Debtors Act* was adopted S.S. 1919-20, c. 81 (now R.S.S. 1978, c. A-2), which did not provide for arrest of absconding debtors.

[17] *Miller v. Morse Hardware Co. Ltd. v. Smart*, [1917] 3 W.W.R. 1113 (C.A.) distinguishing *Weidman v. McClary Mfg. Co.*, [1917] 2 W.W.R. 210 (S.C.).

[18] *B.C. Millwork Products Ltd. v. Overhead Door Sales (Van.) Ltd.* (1961), 34 W.W.R. 86 (B.C.S.C.).

[19] R.S.S. 1979, c. E-12, ss. 12-16, relating to charging orders. See generally, C.R.B. Dunlop, *Creditor-Debtor Law in Canada*, Toronto, 1981, 163.

[20] S.S. 1918-19, c. 80.

[21] *An Act respecting the Imperial Debtors Act*, 1869, S.S. 1918-19, c. 83. The Act declared the *Debtors Act* not in force, and also abolished the common law and equity permitting attachment of the person for debt.

Unfortunately, the 1918-19 Act was not consolidated in the 1920 Revised Statutes. In the result, the legislation became inaccessible. Queen's Bench Rule 523 (1961) permitted enforcement of maintenance orders "by process for contempt." In *Mihalyko v. Mihalyko*, [1974] 2 W.W.R. 742, Bayda J. (as he was then) considered the foundation of Rule 523.

that the other English statutes considered above have also been superseded by local legislation.[22]

The economic expansion of Great Britain during the Industrial Revolution inevitably required significant changes in commercial law. The evolution of the law of the sale of goods provides a paradigm for the development in other areas. As Goode notes, "[A] particular source of difficulty was the all persuasive influence of land law, which until late into the 19th century dominated the English law."[23] The emphasis was gradually changed by the courts, but not without extrinsic help. Treatises by Blackburn and Benjamin, influenced by theoretical considerations drawn from the French jurist Pothier, conditioned the development of the common law.[24] Legislative intervention did not occur until the process had largely been completed. The *Sale of Goods Act*,

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Relying on a series of cases decided before 1918, he held that the *Debtors Act* remained in force in Saskatchewan, supporting and regulating imprisonment for non-payment of maintenance under Rule 523. This error was not noted until *Materna v. Materna* (1983), 25 Sask. R. 175. Vancise J., referring to the 1918-19 legislation, held the successor to Rule 523 (Rule 624) *ultra vires*. Authority to attach maintenance defaulters for contempt is now provided by statute: *The Enforcement of Maintenance Orders Act*, S.S. 1984-85, c. E-9.2, s. 44.

[22] Attachment: *The Attachment of Debts Act*, R.S.S. 1978, c. A-32; exemptions: *The Exemptions Act*, R.S.S. 1978, c. E-14. Examination of the judgment debtors is authorized by Rule 383 of the Rules of the Court of Queen's Bench. Although the examination procedure was originally founded on statute, and the Saskatchewan rule apparently modelled on the English rules (see Dunlop, *supra* note 19, at 119), it is probably now safe enough to regard it as a purely procedural matter requiring no statutory foundation.

[23] Goode, *supra* note 1, at 144.

[24] Crossley Vaines, *Personal Property* (3rd.), London, 1962, 282.

1893[25] was intended to consolidate the common law.[26] Drafted by Sir MacKenize Chalmers, who also prepared the *Bills of Exchange Act*, 1882[27], it was part of a late 19th century trend toward codification and consolidation of commercial law. Neither the *Sale of Goods Act* nor the *Bills of Exchange Act*, 1882 were received in Canada, but all provinces and territories (with one exception) have now adopted legislation based on the Chalmers' *Sale of Goods Act*[28], and federal bills of exchange legislation is modelled on the 1882 statute.

The *Bills of Exchange Act* consolidated a series of earlier 19th century enactments; the *Factors Act*, 1889 similarly consolidated legislation of 1823, 1825, 1842 and 1877.[29] The earlier *Factors Acts* were likely received as part of the law of Saskatchewan in 1870, but were no doubt superseded by the Saskatchewan *Factors Act*, modelled on the 1889 English statute.[30]

Other Saskatchewan commercial law statutes evolved with only indirect

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[25] 56 & 57 Vict., c. 71.

[26] See Sir Mackenzie Chalmers, *Sale of Goods*, London, 1894, Introduction.

[27] 45 & 46 Vict., c. 61.

[28] The Territorial Sale of Goods Ordinance, C.O. 1898, c. 39, s. 2 was consolidated as the Sale of Goods Act, R.S.S. 1909, c. 147. See now R.S.S. 1978, S-1. Newfoundland has no *Sale of Goods Act*.

[29] *Factors Act*, 1823, 4 Geo. 4, c. 83; 1825, 6 Geo. 4, c. 94; 1842, 5 & 6 Vict., c. 39; 1877, 40 & 41 Vict., c. 39.

[30] The Act was first contained in a Territorial Ordinance, C.O.N.W.T. 1898, c. 40, and consolidated as R.S.S. 1909, c. 148. See now R.S.S. 1978, c. F-1.

English influence. The first Saskatchewan *Bills of Sale and Chattel Mortgages Act*[31] was copied from Ontario legislation adopted in 1849.[32] English Bills of Sale legislation was not adopted until 1854.[33] The inspiration for the Canadian legislation came from the United States, where registration of chattel mortgages dates to 1820.[34] Similarly, the Saskatchewan *Choses in Action Act*[35] was not based on its English analogue,[36] but on Ontario legislation that preceded the English.[37]

In sum, very little of the 19th century statutory reforms escaped the attention of provincial legislators. There are, however, two miscellaneous enactments prior to 1870 which appear to remain in force: the *Mercantile Law Amendment Act*, 1856,[38] and the *Bills of Lading Act*,

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[31] R.S.S. 1909, c. 144, re-enacting C.O.N.W.T. 1898, c. 43. The legislation was reformulated in 1928 in accordance with the Uniform *Bills of Sale Act*, and repealed by *The Personal Property Security Act*, S.S. 1979-80, c. P-6.1.

[32] *An Act requiring Mortgages of Personal Property in Upper Canada to be Filed*, 1849, c. 44, re-enacted 1857, c. 3.

[33] 17 & 18 Vict., c. 36.

[34] See G. Gilmore, *Security Interests in Personal Property* (1960), vol. 1, 26.

[35] R.S.S. 1978, c. C-11, adopted from C.O.N.W.T. 1898, c. 41.

[36] The *Judicature Act*, 1873, 36 & 37 Vict., c. 66.

[37] *Choses in Action Act*, S.O. 1871-72, c. 12. Curiously, Ontario later reformulated the legislation to conform with the English statute, leaving Saskatchewan as the only jurisdiction adhering to the earlier model.

[38] 19 & 20 Vict., c. 97.

1855.[39]

2. FRAUDULENT CONVEYANCES AND THE STATUTE OF FRAUDS

(i) Fraudulent Conveyances

The preamble of the *Fraudulent Conveyances Act*, 1570 characterizes its purpose:

> For the avoiding and abolishing of feigned, covinous and frauduent feoffments, gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well as lands and tenements as of goods and chattels [that]...have been made and are devised and contrived of malice, fraud, covin, collusion or guile, to the end, purpose and intent, to delay, hinder or defraud creditors and others....[40]

To this end, the Act declared fraudulent conveyances to be void, and provided criminal sanctions for breach of its provisions. The principal motive behind enactment of the legislation was to prevent conveyances that escaped the *Statute of Enrolments* from being used to defeat creditors and subsequent purchasers of property. Its focus was largely on conveyances made before debt was contracted for the purpose of defrauding creditors who had no notice of the transactions.[41] But the legislation was broad enough in its language to be put to different purposes.

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[39] 18 & 19 Vict., c. 111, discussed below, p. 154 ff.

[40] *Supra* note 6.

[41] The notion of "fraudulent conveyance" as understood in the 16th century is perhaps better conveyed by the *Fraudulent Conveyances Act*, 1585, 27 Eliz. 1, c. 4 (see above, pp. 81-83) which addressed the fraud committed when property is conveyed secretly to X without consideration, then purportedly reconveyed to Y, who could not take good title if the first transaction stood. See Rand, "Historical Basis of Fraud at Common Law" (1964), 3 W. Ont. L.R. 1, where it is suggested that the *Fraudulent Conveyances Acts* were primarily concerned with "simulated transfer" of property.

Beginning with *Twyn's Case* in 1601,[42] the courts

> extended the usefulness of the statute by applying a liberal construction and by permitting the Crown (and therefore the plaintiff creditor) to prove fraudulent intent by reference to surrounding and suspicious circumstances.[43]

The Statute is now sometimes applied to strike down transfers of property made by a debtor after the debt was contracted. The indicia of fraud used by the courts for that purpose are found primarily in the case law, not the statute. Nevertheless, the Statute provided the foundation upon which the case law developed. It is not surprising, therefore, that little doubt has been cast on the proposition that the *Fraudulent Conveyances Act*, 1570 was exported throughout the British Empire. Dunlop succinctly summarizes the authorities:

> It was decided early by American and Canadian courts that the Statute of Elizabeth and the large body of judge-made rules that had grown up around it had become part of local law, at least as a civil remedy for creditors.[44]

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[42] (1601), 76 E.R. 661.

[43] Dunlop, *supra* note 19, at 510.

[44] *Ibid.*, at 511, citing *inter alia*, *Millar v. McTaggart* (1891), 20 O.R. 617 (Ont. C.A.), *Bank of Montreal v. Reis*, [1925] 3 D.L.R. 125 (Sask. Q.B.), *Goyan v. Kinash*, [1945] 2 D.L.R. 749 (Alta.), and *Meeker Cedar Products Ltd. v. Edge* (1968), 12 C.B.R. (N.S.) 49, affirmed without written reasons, 12 C.B.R. (N.S.) 60 (S.C.C.). Dunlop concludes that it is "more doubtful" that the criminal sanctions contained in the Statute (s. 3) were also received as part of Canadian law, citing *Miller v. McTaggart*. Presumably, the criminal sanctions were received as part of the law of Saskatchewan in 1870, becoming part of the received law within federal jurisdiction. Abolition of common law and English statutory offences

THE STATUS OF ENGLISH STATUTE LAW

The only question that has been raised about the status of the *Fraudulent Conveyances Act* in Canada had to do with the relationship between the Act and fraudulent preferences and bankruptcy legislation. At common law, preference of one creditor over another on the eve of bankruptcy was regarded as fraudulent.[45] The principle was given a statutory foundation in the English *Bankruptcy Act* of 1869[46], and found its way into Canadian statute law. *Insolvency Acts* were adopted by the Federal Parliament in 1869 and 1875,[47] but repealed in 1880. Dominion bankruptcy legislation was again enacted in 1919, but in the interim the provinces had filled the gap.[48] The Saskatchewan *Assignments Act*, like other provincial insolvency legislation, included provisions prohibiting fraudulent preferences.[49] Similar provisions were also included in Dominion bankruptcy legislation after 1919. The *Assignments Act* was repealed in 1920, but the fraudulent preference provisions were

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in the Criminal Code revision of 1954 would therefore have rendered the criminal sanctions inoperative.

[45] Dunlop, *supra* note 19, at 510.

[46] 32 & 33 Vict., c. 71.

[47] S.C. 1869, c. 16; S.C. 1875, c. 16.

[48] The legislative history is summarized from Dunlop, *supra* note 19, at 511.

[49] An *Ordinance respecting Preferential Assignments* was adopted in 1888 (O.N.W.T., c. 49), and re-enacted as The *Assignments Act*, R.S.S. 1909, c. 142.

re-enacted as the *Fraudulent Preferences Act.*[50]

Although fraudulent preferences legislation was primarily designed to deal with the rights of creditors *inter se*, not conveyances to defeat creditors generally, there is considerable overlap between fraudulent preferences and fraudulent conveyances legislation. The Saskatchewan *Fraudulent Preferences Act* uses language virtually identical to the *Fraudulent Conveyances Act*, 1570. It provides that:

> Subject to sections 8, 9, 10 and 11, every gift, conveyance, assignment or transfer, delivery over or payment of goods, chattels, or effects or of bills, bonds, notes or securities or of shares, dividends, premiums or bonus in a bank, company of corporation, or of any other property real or personal, made by a person at a time when he is in insolvent circumstances or is unable to pay his debts in full or knows that he is on the eve of insolvency, with intent to defeat, hinder, delay or prejudice his creditors or any one or more of them, is void as against the creditor or creditors injured, delayed or prejudiced.[51]

In *Huss v. Lakin* in 1924, the Saskatchewan Court of Queen's Bench held that by legislating on the same subject matter as the *Fraudulent Conveyances Act*, the Legislature was specifying what transfers are fraudulent and what class of persons can attack them. In doing so, the Legislature had dealt fully with the subject matter, and by implication repealed the English statute.[52] A similar result was reached in Alberta in *Arnold v. Fleming*[53]. The Alberta Legislature responded to that decision by amending the Provincial *Fraudulent Preferences Act* to provide expressly that the *Fraudulent Conveyances Act* remained in force.[54] Whether the Saskatchewan Legislature was inclined to respond in the same manner as its Alberta counterpart became an academic question in 1925 when Taylor J. rejected *Huss v. Lakin* and concluded that neither the *Fraudulent Preferences Act* nor the preceding enactments of the Territorial Legislature had repealed the *Fraudulent Conveyances Act*. He held that:

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[50] R.S.S. 1920, c. 204, see now, R.S.S. 1978, c. F-21. Despite some early doubts, it now appears to be settled law that fraudulent preferences legislation is *intra vires* the provinces: *Robinson v. Countrywide Factors Ltd.* (1977), 72 D.L.R. (3rd) 500 (S.C.C.).

[51] Section 3.

> The true position would seem to me to be this: In the provincial legislation and the preceding enactments in the Territories, the various legislatures were not dealing with the entire subject-matter of the *Statute of Elizabeth* but only with a sub-title, "assignments by insolvents, & C., in fraud, of creditors" and were extending the principle to avoid not only conveyances which might have been held to be fraudulent under the law as it then stood, but also conveyances and assignments by insolvents which unfairly prefer one creditor to another.[55]

The *Fraudulent Conveyances Act* has uniformly been treated as in force in subsequent Saskatchewan decisions;[56] it remains a cornerstone of debtor-creditor law in Saskatchewan.[57]

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[52] [1924] 3 W.W.R. 841.

[53] [1923] 1 W.W.R. 706.

[54] The *Statute Law Amendment Act*, 1923, c. 5, s. 46.

[55] *Bank of Montreal v. Reis*, *supra* note 44.

(ii) Statute of Frauds

Like the *Fraudulent Conveyances Act*, the *Statute of Frauds*, 1677[58] appeared necessary to Parliament because of the inadequacies of the conveyancing system in the 16th and 17th centuries. Legal title could be conveyed at common law only by livery of seisin, a symbolic giving of possession accompanied by public notoriety.[59] By the 16th century, it had become common practice to evidence livery of seisin by a written charter. The *Statute of Frauds* formalized this practice, requiring all conveyances of real property to be "evidenced in writing". That the legislation was also extended to wills, trusts and certain contracts was a reflection of the unsettled conditions following the English Civil War. The Statute itself recited that it was enacted "for the prevention of many fraudulent practices which are commonly endeavoured to be upheld by perjury or subordination of perjury".[60] Although the Statute has often been criticized as an anachronism,[61] there is a long line of authority confirming its reception in Saskatchewan,[62] and the Statute has been re-enacted in four provinces.[63]

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[56] *Petryshyn v. Cochan*, [1940] 2 W.W.R. 353 (Sask. K.B.), *Stewart v. Zacharuk* [1949] 1 W.W.R. 213 (Sask. K.B.).

[57] It should be noted that several provinces have re-enacted the statute, with at least some modernization of language: see *Fraudulent Conveyances Act*, R.S.B.C. 1979, c. 142; *Fraudulent Conveyances Act*, C.C.S.M., c. F. 160; *Fraudulent Conveyances Act*, 1974 (Nfld.) c. 29; and *Fraudulent Conveyances Act*, R.S.O. 1970, c. 182. Alberta has incorporated the substance of the *Fraudulent Conveyances Act* in Rules of Court, but the rules differ in some respects from the Act.

[58] *Supra* note 7.

[59] See above, pp. 59-60.

The *Statute of Frauds* in force in Saskatchewan today is not identical to the original 1677 Statute. The Act originally consisted of 25 sections. Only sections 1-9 and 17 were concerned with the subject matter usually associated with the *Statute of Frauds*: sections 1-3 required grants of real property and most leases to be evidenced in writing, section 4 required certain classes of contracts to be evidenced in writing; sections 5 and 6 required wills to be written, and sections 7-9 established writing requirements for trusts. Section 17 required executory contracts for sales of goods of a value above ten pounds to be evidenced in writing. Sections 5 and 6 were repealed by the *Wills Act*, 1837, as were sections 19-25, which also related to wills.[64] Sections 10-16 and 18 related to enforcement of judgments. These sections are essentially procedural, and may never have been received as part of the law of Saskatchewan. Although section 17 was probably received, it was superseded by the provisions of the Provincial *Sale of Goods Act*, which makes a written memorandum necessary for the enforcement of a contract for the sale of goods worth $50 or more.[65]

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[60] Holdsworth, *The History of English Law*, vol. vi, 388 suggests the statute was specifically intended to control juries, which often fell under the influence of the parties to litigation.

[61] See Sixth Interim Report (1971) of the Law Revision Committee of England, and more recently the reports on the *Statute of Frauds* of the Manitoba (1980) and B.C. (1977) Law Reform Commissions. The Statute has been repealed in Manitoba (S.M. 1982-83-84, c. 34, s. 1) and British Columbia (S.B.C. 1985, c. 10, s. 8). In Saskatchewan, the statute has been said to have resulted in a "cornucopia of litigation with consequential costs" and "an over-abundance of often unreconciliable precedents": *Chapman v. Kopitoski*, [1972] 6 W.W.R. 525 (Q.B.), per Disbery J.

[62] E.g. *Rose v. Winters* (1900), 4 Terr. L.R. 353; *Gilmour v. Griffiths* (1904), 7 Terr. L.R. 225; *Adamson v. Vachon* (1912), 5 Sask. L.R. 400 (C.A.); *McArthur v. Banman* (1922), 16 Sask. L.R. 61 (C.A.); *Balaberda v. Mucha* (1960), 25 D.L.R. (2nd) 760 (C.A.); *McKenzie v. Hiscock* (1965), 54 W.W.R. 163 (C.A.); *Jones v. Kennedy* (1982), 14 Sask. R. 114 (Q.B.); and *Bell Sokalski v. Guaranty Trust*, [1984] 2 W.W.R. 348 (C.A.).

[63] Ontario: R.S.O. 1980, c. 481; Prince Edward Island: R.S.P.E.I. 1974, c. S-6; New Brunswick, R.S.N.B. 1973, c. S-14; Nova Scotia: R.S.N.S. 1967, c. 290.

The *Statute of Frauds* was amended by the *Statute of Frauds Amendment Act*, 1828, also known as *Lord Tenterden's Act*.[66] Sections 5 and 6 of the 1828 Act apparently remain in force in Saskatchewan.[67] Section 5 provides that no action shall be maintained against an adult on any promise to pay made during infancy unless the promise is evidenced in writing.[68] Section 6 requires writing in order to maintain an action based upon any representation as to character or credit.

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[64] See above, p. 102.

[65] *Supra* note 28, s. 6(1).

[66] 9 Geo. 4, c. 14.

[67] See *Molyneux v. Traill* (1915), 32 W.L.R. 292 (Sask. D.C.).

3. MISCELLANEOUS 19TH CENTURY STATUTES

(i) The Mercantile Law Amendment Act

The *Mercantile Law Amendment Act*, 1856 contains a curious mixture of topics. It deals with writs of execution, guarantees, acceptance of bills of exchange and limitation of actions. The thread tying these various matters together was an effort to correct certain aspects of the law that were thought to frustrate commercial practice. However, of the 15 substantive provisions contained in the Act, only two remain in force in Saskatchewan. Several sections of the Act do not, on their own terms, have application outside the United Kingdom.[69] Several provisions governing limitation of actions were expressly repealed by the

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[68] This was one of the few statutory provisions relating to infants' contracts adopted prior to the post-reception *Infant's Relief Act*, 1874, 37 & 38 Vict., c. 52. One other pre-reception statute affecting infants' contracts was the *Infant's Settlements Act*, 1855, 18 & 19 Vict., c. 43 (re-enacted R.S.B.C. 1911, c. 107), reversing in part the common law rule that rendered marriage settlements entered into by infants voidable. It permitted the Court of Chancery to approve settlements by males of the full age of 20, and females of the full age of 17. Although the legislation may be in force, it is unnecessary to retain it. Not only has reduction of the age of majority reduced the scope of the legislation, but marriage settlements are not enforceable against third parties in Saskatchewan unless registered (*Marriage Settlement Act*, R.S.S. 1978, c. M-5); no marriage settlement has been registered under the Act for many years.

[69] *Supra* note 38, sections 2, 7, 8, 12 and 15.

Saskatchewan Legislature in 1932.[70] Section 1 of the Act provides that a *bona fide* purchaser for value without notice of a writ of execution takes good title to goods subject to the writ. The substance of this provision is now contained in the Saskatchewan *Executions Act.*[71] Section 6 of the Act relates to acceptance of bills of exchange. It has been incorporated in substance in the federal *Bills of Exchange Act.*

The provisions of the *Mercantile Law Amendment Act* that remain in force in Saskatchewan relate to guarantees. Section 3 provides that no guarantee is invalid by reason only that the consideration for the promise does not appear in writing or by necessary inference from a written document. The *Statute of Frauds* provided that guarantees must be in writing. The courts interpreted this to mean that both the promise and the consideration for it had to be evidenced by writing.[72] Section 3 of the *Mercantile Law Amendment Act* reverses this line of authority: the consideration need not appear in writing.

Section 5 is likely the more important provision. It provides that if a surety pays the debt guaranteed, he is entitled to have assigned to him all securities held by the creditor in respect of the debt, whether or not the security is deemed at law to be satisfied by payment of the debt. This permits the guarantor to proceed against the primary debtor and to be subrogated to the securities held by the creditor. This provision altered the common law rule, which provided that the guarantor was entitled only to the benefit of those securities which were not discharged or satisfied by payment to the creditor.[73]

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[70] *The Limitation of Actions Act*, S.S. 1932, c. 18, s. 45 repealed sections 9, 11, 13 and 14 of the *Mercantile Law Amendment Act.* In addition, although section 10 was not repealed, its force is almost certainly spent since it can only apply to actions accruing before 1932, all of which are now statute-barred.

[71] *Supra* note 19, ss. 2.1(f) and 2.2(a).

[72] See 4 Hals. (1st) 20, para. 122, citing *Wain v. Walters* (1804), 5 East 10, *Saunders v. Wakefield* (1821), 4 B. & Ald. 595, and *Herman v. Jeuchner* (1885), 15 Q.B.D. 561.

Section 5 of the *Mercantile Law Amendment Act* has been held to have been received in both Manitoba and Alberta.[74] There can be little doubt that both it and section 3 of the Act are in force in Saskatchewan,[75] and these provisions remain an important part of the law of guarantees.

(ii) Bills of Lading

At common law, transfer of a bill of lading transferred only property in the goods, not the contract of carriage.[76] The *Bills of Lading Act*, 1855 modified the common law by providing that if a bill of lading is negotiable, negotiation of the bill transfers contractual rights as well as the property rights in the goods. Similar legislation has been adopted in two Canadian provinces and by the Federal Parliament.[77]

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[73] See Goff and Jones, *The Law of Restitution*, London, 1978, 416.

[74] *Canadian Northwest Land Company v. Chavins*, [1925] 1 W.W.R. 858 (Man. K.B.); *Griffith v. Wade* (1966), 58 W.W.R. 343 (Alta. C.A.).

[75] There is one other provision in the *Mercantile Law Amendment Act*, also relating to guarantees. Section 4 provided that a continuing guarantee given by a firm is not binding after a change in the name of the firm, unless a contrary intention appears in the guarantee. This provision was replaced in England in 1890 by the *Partnership Act*, 1890, 53 & 54 Vict., c. 39. Section 20 of the Saskatchewan *Partnership Act*, R.S.S. 1978, c. P-3 is similar.

[76] See *Sanders v. Vanzelles* (1843), 4 Q.B. 260, 114 E.R. 897.

Although a bill of lading includes virtually any receipt given by a carrier that evidences a contract of carriage[78], the *Bills of Lading Act*, 1855, has application only to negotiable bills of lading. According to commercial usage, only bills of lading involved in long distance carriage are negotiable.[79] Receipts issued by carriers involved in purely provincial undertakings are not ordinarily negotiable, and bills of lading involved in international or inter-provincial trade are governed by the Federal Act rather than the received English statute. Nevertheless, it is possible that a rare bill of lading issued for carriage in the province will be negotiable, and there is enough uncertainty about the federal trade and commerce power to make the scope of application of the federal Act uncertain.

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[77] *Supra* note 39 (English Act); The *Mercantile Law Amendment Act*, R.S.O. 1980, c. 265; *Bills of Lading Act*, R.S.N.S. 1967, c.22; *Bills of Lading Act*, R.S.C. 1970, c. B-6.

[78] See the definition of bill of lading in the *Banks and Banking Law Revision Act*, 1980, R.S.C. 1980-81-82-83, c. 40, s. 2(1), which is essentially a codification of the common law definition for purposes of the Act.

[79] On negotiable bills of lading in Canada generally, see R.J. Wood, *The Pledge of Documents of Title in Ontario*, (1984) 9 C.B.L.J. 81.

SUMMARY - STATUS OF LEGISLATION CONSIDERED

1. **ACTS OR PROVISIONS OF ACTS THAT HAVE BEEN FOUND TO BE OR LIKELY ARE IN FORCE AS PART OF PROVINCIAL LAW, AND REMAINING ESSENTIAL.**

   Fraudulent Conveyances Act, 1570 (except 5.3)*

   Statute of Frauds, 1677, ss. 1-4, 7-9*

   Statute of Frauds Amendment Act, 1828, ss. 5 and 6*

   Mercantile Law Amendment Act, 1856 ss. 3 and 5

2. **ACTS OR PROVISIONS OF ACTS THAT HAVE BEEN FOUND TO BE OR THAT MAY BE IN FORCE, BUT ARE NOW OF LITTLE OR NO UTILITY.**

   Bills of Lading Act, 1855

3. **ACTS OR PROVISIONS OF ACTS THAT HAVE BEEN FOUND OR DECLARED TO BE NOT IN FORCE, OR THAT ARE LIKELY NOT IN FORCE, BUT CONSIDERED IN THE TEXT.**

   Stat. Geo. 2, 1732, c. 7**

   Debtors Act, 1869**

   Mercantile Law Amendment Act, 1856, ss. 4, 11, 13, 14**

   Mercantile Law Amendment Act, 1856 [except as otherwise noted]

   Statute of Frauds, 1677 [except as otherwise noted]

4. **ACTS OR PROVISIONS OF ACTS THAT WERE HELD TO BE RECEIVED, OR WHICH WERE LIKELY RECEIVED, BUT SUPERSEDED BY SIMILAR SASKATCHEWAN LEGISLATION.**

   Statute of Westminister Secundus, 1285, cc. 18 and 45

   Statute of Frauds, 1677, s. 17

   Factors Acts, 1823, 1825, 1842

   Judgements Acts, 1838 and 1840*

   Small Debts Act, 1845

COMMERCIAL LAW

Common Law Procedure Act, 1854, ss. 60-66

Bills of Sale Act, 1854

Mercantile Law Amendments Act, 1856, s. 1

Wages Attachment Abolition Act, 1870

* Held to be in force by a Saskatchewan court.

** Expressly repealed by a Saskatchewan statute.

CHAPTER V

TORT LAW

1. BACKGROUND

Winfield wrote that "the chief source of our law of tort is the common law as opposed to statute law".[1] Even during the 19th century, tort law remained the preserve of the courts rather than Parliament. The development of the law of negligence, the most significant Victorian innovation in torts, was, according to Fleming, "undoubtedly stimulated by the advent of machinery, and faster traffic along turnpike and railway".[2] But the response of the law to these new realities was almost entirely the work of judges. Legislators did not contribute at all to the elaboration of negligence law until well after reception date.[3]

In a few areas of tort law, however, Parliament did act before the courts: Lord Campbell gave his name to the popular titles of the *Libel*

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[1] P.H. Winfield, *A Text-book of the Law of Tort* (3rd), London, 1946, 1.

[2] John G. Fleming, *The Law of Torts* (4th.), Melbourne, 1971, 103.

[3] The first major statutory modification of negligence principles - contributory negligence legislation - is also one of the few examples of Canadian law exported to England rather than vice versa. Contributory negligence legislation was adopted S.O. 1924, c. 32, and extended by the *Negligence Act*, S.O. 1930, c. 27. English legislation was adopted in 1945. The Saskatchewan *Contributory Neligence Act*, R.S.S. 1978, c. C-31 is based on the Ontario model.

and Slander Acts of 1843 and 1845,[4] and to the *Fatal Accidents Act*, 1846.[5] A further *Fatal Accidents Act* was adopted in 1864.[6] The *Common Law Procedure Act*, 1833 enabled personal representatives to sue for injury to the deceased's property during his lifetime, and to be sued for injury to property caused by the deceased.[7] There were no other efforts at modernization of tort law on a broad scale prior to reception.

Lord Campbell's *Libel and Slander Acts* were the precursors of the Saskatchewan *Libel and Slander Act*,[8] and his *Fatal Accidents Act* was the

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[4] 6 & 7 Vict., c. 96; 8 & 9 Vict., c. 75.

[5] 9 & 10 Vict., c. 93.

[6] 27 & 28 Vict., c. 95.

[7] At common law, personal representatives could neither sue nor be sued in tort. (1285), 13 Edw. 1, Stat. 1, c. 23 (*Westminster II*) permitted personal representatives to sue and defend actions of account. (1330), 4 Edw. 3, c. 7 and (1351), 25 Edw. 3, st. 5, c. 5 permitted personal representatives to sue for most injuries to the goods and chattels of the deceased. The *Common Law Procedure Act*, 1833, 3 & 4 Will. 4, c. 42 extended the statutory rule to cover injuries to real property and to permit actions against the estate for injuries to both real and personal property. Several other statutes also appear to have affected the common law rule incidentally. See P.H. Winfield, "Death as Affecting Liability in Tort" (1929), 29 *Columbia Law Review*, No. 3, 239.

[8] The 1843 *Libel and Slander Act* was held in force in Alberta in *Goode v. Journal Publishing* (1907), 6 W.L.R. 511 and *Park v. Journal Co. Ltd.* (1911), 16 W.L.R. 705, and in B.C. in *Hoste v. Victoria Times* (1889), 1 B.C.R. (Part II), 365. The substance of both the 1843 and 1845 Acts was adopted in Saskatchewan in the *Libel and Slander Act*, R.S.S. 1909, c. 71 (see now R.S.S. 1978, c. L-14). The only substantive provisions in the English *Libel and Slander Acts* omitted in the Saskatchewan Act dealt with criminal libel, not a subject within provincial jurisdiction (see now the *Criminal Code*, ss. 260-280).

There were several other statutes adopted prior to 1870 relating to defamation that were apparently not received as part of provincial law. *Fox's Libel Act* (1792), 32 Geo. 3, c. 60 was exclusively concerned with criminal libel. Privilege was afforded to publication basis for the first Saskatchewan fatal accidents legislation.[9] Neither legislative initiative remains part of the law of Saskatchewan. Survival of actions legislation adopted in Canada after reception date has superseded the 1833 legislation.[10]

Although legislative intervention in tort matters has been rare, a few miscellaneous statutes affecting liability in tort were adopted from time to time by the English Parliament. Most were of local application, or have been superseded by provincial legislation,[11] but a few appear to

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of proceedings of Parliament by the Act of (1840), 3 & 4 Vict., c. 9; it probably applied only to the English Parliament and in any event a similar privilege is now contained in the Provincial *Libel and Slander Act*. Section 61 of the *Common Law Procedure Act*, 1854 created the rule that a plea that words are defamatory in other than the ordinary meaning (innuendo) sets up two causes of action, one based on ordinary meaning, the other on innuendo. The rule is merely procedural, and may not have been received. It was repealed in England by 46 & 47 Vict., c. 49 in 1883, but the courts have continued to apply it as a matter of practice. It can safely be regarded as based on practice rather than statute in Canada. Eighteenth and nineteenth century English statutes on defamation are collected, with explanatory notes, in W.B. Odgers, *A Digest of the Law of Libel and Slander* (4th ed.), London, 1905, Appendix C.

[9] *An Act respecting the compensation to families of persons killed by accidents*, R.S.S. 1909, c. 135 re-enacted O.N.W.T., 1884, No. 12. It included all but the procedural provisions of the 1846 Act. The *Fatal Accidents Act*, 1920 (S.S. 1920, c.29, see now R.S.S. 1978, c. F-11) included some additional provisions based on the 1864 *Fatal Accidents Act*.

[10] See *The Trustee Act*, R.S.S. 1978, c. T-23, ss. 58-60, originally enacted O.N.W.T. 1903, No. 2, c. 11, ss. 29-30. The provisions are broader than the English legislation, extending to injury to person as well as property. This is another example of innovative legislation from Ontario. The first comprehensive survival of actions legislation extending to personal injury as well as property torts was enacted in Ontario: The *Statute Amendment Act*, S.O. 1886, c. 16, s. 23. England did not adopt the reform until 1934.

[11] E.g., The *Dogs Act*, 1865, 28 & 29 Vict., c. 60 (liability for damage to livestock caused by dogs) though held in force in Saskatchewan in a 1953 District Court decision (*Popp v. Hoffman* (1953), 10 W.W.R. 337), was held to be of only local application in England by the Alberta courts (*Raisbeck v. Desabrais*, [1971] 1 W.W.R. 678 (C.A.)). In any event, it

remain in force. These enactments include some significant legal rules, still frequently applied by the courts, and some of that may no longer have any real place in Saskatchewan law.

2. STATUTES THAT MAY REMAIN IN FORCE

(i) The Fires Prevention Act

The *Fires Prevention (Metropolis) Act*, 1774[12] was adopted "to better prevent the mischiefs" caused by fires in the cities of London and Westminster, but sections 83 and 86 were applicable to the whole of England, and were received in Canada.[13]

Section 83 has been superseded by the Saskatchewan *Insurance Act*. It provided that an insurance company could require that proceeds of a policy be spent on repairing or reconstructing fire damaged buildings. The *Insurance Act* includes a statutory condition deemed to be part of every contract of fire insurance that permits the insurer to "repair, rebuild, or replace the property damaged or lost" instead of paying the insurance proceeds to the insured.[14] Section 83 of the English Act has

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would now appear to be wholly superseded by the *Animal Protection Act*, adopted in 1972 (see now R.S.S. 1978, c. A-21).

[12] 14 Geo. 3, c. 78.

[13] Ont: *Carr v. Fire Assurance Association* (1887), 14 O.R. 487; Man: *Mainella v. Wilding*, [1948] 1 W.W.R. 366; B.C.: *Laidlaw v. Crow's Nest Pass Railyway Co.* (1909), 10W. L.R. 17, *Wilson v. Port Coquitlam*, [1923] S.C.R. 235; Alb: *Gallo v. St. Cyr*, [1983] 2 W.W.R. 395; Sask.: *Royal Bank of Canada v. Pischke*, [1933] 1 W.W.R. 145 (D.C.).

[14] R.S.S. 1978, c. S-26, s. 128.

been held to be no longer in force in Saskatchewan.[15]

Section 86 of the *Fires Prevention Act*, on the other hand, apparently remains in force. At common law, if the origin of a fire could not be traced, there was a presumption that it had been kindled by the occupier of the premises or his servant. Section 86 reduced the severity of the common law rule by removing the presumption where the fire could be attributed to mere accident. The provision was first held in force in Saskatchewan in 1933 in *Cherry v. Smith*,[16] and the status of the provision has been more recently confirmed by both Queen's Bench and Court of Appeal decisions.[17]

(ii) Liability of Constables and Justices

Constables acting in the course of duty were given protection from civil actions by the *Constables Protection Act*, 1750.[18] The legislation relieved a constable from liability when executing a warrant, even if the warrant proved defective, and so long as excessive force was not used.[19] It was amended by the *Justices Protection Act*, 1848[20] which also provided that a justice or magistrate could not be sued "for any act done in execution of his duties" unless he acted "maliciously and without reasonable or probable cause." The 1848 legislation was held in force in Saskatchewan in 1919 in *Pollon v. Kobzar School District*[21], but has been superseded in regard to justices and magistrates by the *Provincial Court Act*, which reproduces its substance.[22] The *Constables Protection Act* was held in force in British Columbia in 1958 in *Savinkoff v. Borodula*.[23] Its status in Saskatchewan is, however, equivocal.

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[15] *Royal Bank of Canada v. Pischke*, *supra* note 13, noted with approval in *Wawanesa v. Co-op Fire Insurance Co.*, [1981] 2 W.W.R. 2735 (Q.B.).

[16] [1933] 1 W.W.R. 205 (D.C.).

[17] *Walt v. Newton Motors* (1950), 2 D.L.R. 351 (C.A.); *Hallick v. Doroschuk* (1986), 41 Sask. R. 151 (Q.B.).

[18] 24 Geo. 2, c. 44.

The *Criminal Code* provides protection against civil action for "everyone who is required or authorized by law to do anything in the administration or enforcement of the law", and who does not use excessive force.[24] The *Code* will relieve constables from liability when enforcing the criminal law in circumstances analogous to those to which the *Constables Protection Act* applied. The *Code*, however, cannot relieve constables from civil liability when enforcing provincial law. In *Savinkoff v. Borodula*, for example, the status of the *Constables Protection Act* arose because execution of a warrant to apprehend a child "in need of protection" was involved. It is likely that the *Constables Protection Act* is in force in Saskatchewan, but it may not add much to the common law as interpreted by Canadian courts. In *Priestman v. Colangelo*, the Supreme Court of Canada applied the maxim *salus populi suprema est lex* to relieve police officers from liability when acting reasonably in the course of their duty.[25] A constable executing an apparently valid warrant would fall within the scope of the protection outlined in that decision.[26]

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[19] The legislation apparently modified the complete immunity given constables in regard to acts done "by virtue" of office by the *Public Officers Act*, 1609, 7 Jac. 1, c. 5, which also applied to "mayors, bailiffs... tithing men, and subsidy collectors." The 1609 Act was held not to be in force in *Plestead v. McLeod* (1909), 12 W.L.R. 700 (Sask. D.C.), but even if it was received, it was superseded by the *Public Officers Protection Act*, 1923, S.S. 1922-23, c. 19. See now, R.S.S. 1978, c. P-40. Actions may now be taken against public officers subject to a limitation period.

[20] 11 & 12 Vict., c. 44.

[21] [1919] 3 W.W.R. 771 (K.B.).

[22] R.S.S. 1978, c. P-30.1.

[23] (1958), 26 W.W.R. 370 (B.C.S.C.).

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[24] *Criminal Code*, s. 25.

[25] [1959] S.C.R. 615.

[26] Reference was made in the Supreme Court decision both to the *Criminal Code* and to provisions of the Ontario *Police Act* placing a duty on police officers to enforce the law. The immunity flowed from the duty, in the court's analysis. Saskatchewan legislation creates no general duty similar to that found in the Ontario legislation, but an apparently valid warrant would itself impose a duty upon the constable to whom it was directed.

(iii) The Offences Against the Person Act

In 1979, the *Offences against the Person Act*, 1861[27] was held to be no longer in force in Saskatchewan in *Stevens v. Quinney*.[28] Nevertheless, enough controversy surrounds the status of the legislation to make it impossible to accept this decision as the final word on the matter.

Most of the Act dealt with purely criminal law matters subsequently superseded by the *Criminal Code*. Section 45 of the Act, however, had both civil and criminal aspects. It disallowed a civil proceeding against anyone charged with assault who has been prosecuted, convicted and paid the penalty, or who has had the charge dismissed. In 1869, the Canadian Parliament enacted its own *Offences against the Person Act*,[29] adopting the English statute, including section 45, practically verbatim. The provision analogous to section 45 subsequently became part of the *Summary Convictions Act*,[30] and was included in the 1892 *Criminal Code*.[31] Whether the federal legislation was properly enacted under the Dominion criminal law power was never definitively established.

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[27] 24 & 25 Vict., c. 100.

[28] [1979] 5 W.W.R. 284 (Q.B.).

[29] S.C. 1869, c. 20.

[30] R.S.C. 1886, c. 178, s. 75.

[31] S.C. 1892, c. 29, s. 866, repealed S.C. 1953-54, c. 51.

The rationale for section 45 of the *Offences Against the Person Act* can no longer be discovered.[32] Probably for that reason, the analogous Criminal Code provision was repealed as part of the general revision of the code in 1954.[33] No doubt, it was assumed that the repeal would abolish the principle contained in the repealed provision. Unfortunately, the constitutional uncertainty about the code provision that existed before 1954 makes it impossible to be certain about the effect of the repeal. If the subject matter of section 45 is essentially criminal law, federal re-enactment of the provision superseded the English legislation. In that event, the rule originally created by section 45 was no longer part of the law of Canada after 1954. On the other hand, if the subject matter of section 45 is within provincial jurisdiction, the federal enactments copying section 45 were *ultra vires*. In that event, section 45 has always been and remains in force in Saskatchewan.

The New Brunswick Supreme Court held the federal legislation *intra*

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[32] Howard, "The *Offences Against the Persons Act*, s. 45", [1958] Crim. Law Rev. 33 speculated that the provision was adopted out of a belief that because the damage caused by a common assault is usually small, "compensation is less important than the soothing of ruffled feelings and prevention of retaliation." The proposed rationale is questionable, but it does indicate how difficult it is to reconstruct the considerations that led to adoption of the section.

[33] Repeal of the English provision, on the assumption that it remains part of provincial law has also been recommended in Manitoba and British Columbia: *Report on Section 45 of the Offences Against the Person Act*, 1861, Report #8, Manitoba Law Reform Commission, July 27, 1972 and *Report on Offences Against the Person Act*, 1828: section 28, Law Reform Commission of British Columbia, August 8, 1977.

vires in 1886,[34] a position subsequently adopted by the Ontario[35] and Alberta courts.[36] In *Trinea v. Duleba*, Hyndman J.A. disposed of the constitutional question in this manner:

> As to the question of *ultra vires*: I content myself with saying that in my opinion the Dominion Parliament having declared that a common assault is a criminal offence, have the right, if they see fit, to occupy the whole field, with respect thereto, and thus to forbid any civil or other proceeding respecting the same cause.[37]

In *Stevens v. Quinney*, the Saskatchewan Court of Queen's Bench reached the conclusion that the *Offences Against the Persons Act* was no longer in force on the assumption that it had been repealed by valid federal legislation.[38]

An opposing line of authority can be traced back at least as far as *Rice v. Messanger*, a 1929 Nova Scotia decision.[39] In that case it was held that the federal legislation purportedly replacing the *Offences against the Persons Act* infringed provincial jurisdiction over civil rights. This interpretation was followed by the Prince Edward Island

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[34] *Wilson v. Codyre* (1886), 26 N.B.R. 516.

[35] *Hicke v. Brisbain* (1896), 26 O.R. 423.

[36] *Trinea v. Duleba*, [1924] 2 W.W.R. 1177, applied in *Dowsett v. Edmunds*, [1926] 4 D.L.R. 796, *Schultz v. Wolske* (1976), 75 W.W.R. 411, and in *Nelson v. Sneed*, [1976] 1 W.W.R. 360.

[37] *Supra* note 36.

[38] *Supra* note 28.

[39] [1929] 2 D.L.R. 669.

Supreme Court,[40] and received considerable support from Bora Laskin. Writing before his appointment to the Bench, Laskin expressed the opinion that:

> From several standpoints the grounds of decision in the Alberta cases [e.g. *Trinea v. Duleba*] are untenable.... On any view of the authorities with respect to ancilliary legislation, it cannot be said that the provision in section 734 releasing from civil proceedings is "necessarily incidental to" or "reasonably necessary for" or "necessary to control effectively" the criminal offence of common assault.[41]

Since 1954, this approach has been adopted in British Columbia in *Sharkey v. Robertson*.[42] The grounds for the decision are by no means clear, but it does appear that Ruttan J. was of the opinion that the subject matter of the legislation was within the province's jurisdiction over civil rights.[43]

(iv) **Maintenance and Champerty**

Perhaps no other tort has attracted as many miscellaneous statutory glosses as maintenance. Lord Finlay in *Nevill v. Express Newspaper Ltd.*,[44] the leading modern authority on the tort, identified six statutes enacted from the reign of Edward I to the reign of Henry VIII "inflicting particular penalties upon various kinds of maintenance".[45]

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[40] *Dawson v. Multart* (1941), 15 M.P.R. 451.

[41] Bora Laskin, "Constitutional Law - Right of Dominion to Bar Civil Action after Summary Criminal Proceedings for Common Assault" (1941), 19 Can. Bar Rev. 379.

[42] (1969), 67 W.W.R. 712, followed in *McIntyre v. Moon*, [1971] 4 W.W.R. 148 (B.C.S.C.).

[43] See W.M.B. Voroney, "Comments on Legislation and Judicial Decisions" (1982), 60 Can. Bar. Rev. 688.

[44] [1919] A.C. 368 (H.L.).

Maintenance occurs "where one officiously intermeddles in a suit... which no way belongs to him by assisting either party with money or otherwise in the prosecution or defence of any such suit." The related tort of champerty "is a form of maintenance, and occurs when the person maintaining another takes as a reward a portion of the property in dispute".[46] As Fleming notes, maintenance attracted the attention of medieval legislators because it was "a widespread evil, practised by powerful royal officials and nobles to impress their vulnerable neighbors."[47] It would appear that the medieval maintenance statutes were intended to strengthen the law prohibiting maintenance by providing specific procedures and penalties for particularly noxious varieties of maintenance. Most of the early statutes were directed at maintenance by royal officials and maintenance by false evidence or other fraudulent means which, as Lord Finlay pointed out, "would of course be an aggravation of the offence".[48] Only Henry VIII's *Statute of Maintenance*,

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[45] 3 Edw. 1, c. 28; 28 Edw. 1, c. 11; 33 Edw. 1, st. 3; 1 Edw. 3, st. 2, c. 14; 1 Ric. 2, c. 4; and 32 Hen. 8, c. 9.

[46] *Ibid.*, citing *Hawkins' Pleas of the Crown*, 1824, 8th Ed., v. 1, c. 27(6), s. 3.

[47] Fleming, *supra* note 2, at 548. Maintenance was epidemic during the period of the War of Roses, when contending noblemen gathered supporters in part by agreeing to maintain them in their disputes.

[48] *Nevill v. London Express Newspaper*, *supra* note 44.

1540 was of broader scope, but even it confined itself to declaring that "fromhensfurth all statutes heretofore made concerning maintenance, champerty and embracery...shall be put in due execution", and providing a penalty of 10 pounds (to be divided between the Crown and the injured party) "on unlawful maintenance of suits".[49]

Despite the continuing concern of medieval Parliaments with maintenance and champerty, it remained essentially a common law offence. Hawkins wrote that "it seemeth that all maintenance is strictly prohibited by the common law as having a manifest tendency to oppression".[50] Lord Finlay was satisfied that "...none [of the statutes]...in any way cut down on the common law upon the subject."[51] The tort of maintenance arises from its status as a common law offence. Lord Finlay was of the opinion that:

> But the action for maintenance at common law is not, in my opinion, an action for the invasion of a right; it is an action in respect of an offence which causes damage to the plaintiff.[52]

There can be little doubt that the tort of maintenance was received in Canada.[53] Both the common law and statutory offences of champerty and maintenance have been rendered inoperative by the *Criminal Code*, which has provided since 1954 that "no person shall be convicted...of an offence at common law...or of an offence under any Act of the Parliament of England...".[54] But even though the tort was originally founded on the offences, it would appear that the status of the tort has not been affected by abrogation of the offences.[55]

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[49] 32 Hen. 8, c. 9. The Statute also dealt with trafficking in pretensed titles. That aspect of the legislation has been discussed above, Part II, chpt. l.

[50] Cited in *Nevill v. Express Newspaper, supra* note 44.

[51] *Ibid.*

[52] *Ibid.*

Henry VIII's *Statute of Maintenance* and its medieval predeceasors may remain in force as part of the law within provincial jurisdiction to the extent that they provide part of the foundation upon which the tort of maintenance is erected. Nevertheless, the limited scope of the maintenance statutes makes it unnecessary to have recourse to them in practice. They focus on species of maintenance which are now of little or no importance. The common law is sufficient to provide the whole foundation for the tort. This conclusion is strengthened by the fact that there has been a marked change in attitude toward champerty and maintenance in this century. As Fleming notes, "the modern tendency has been to discourage the civil action almost to the point of extinction."[56]

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[53] The Supreme Court of Canada held that the offences associated with maintenance and champerty were introduced into the law of Quebec (*Price v. Mercier* (1891), 18 S.C.R. 303 and British Columbia (*Meloche v. DeGurie* (1903), 34 S.C.R. 24. The existence of the tort appears to have been taken for granted in Saskatchewan in *Speers v. Hagmeister* (1974), 52 D.L.R. (3rd), 201 (C.A.). The decision of the Manitoba Court of Appeal in *Thompson v. Wishart* (1910), 19 M.R. 340, holding that the offences were inapplicable in Manitoba, is anomalous.

[54] S.C. 1953-54, s. 51, s. 8. The offence of maintenance has been described as "not *malum prohibitum* but *malum in se*" (*Wallace v. Duke of Portland* (1797), 3 Ves. 494). Thus it would appear that the offences are "criminal law", within the jurisidiction of the Federal Parliament. See also *Re Legal Professions Act*, [1927] 2 W.W.R. 808 (B.C.C.A.) and *Amacher v. Erickson* (1963), 42 W.W.R. 348 (B.C.S.C.).

[55] The courts appear to have assumed that maintenance and champerty remain wrongful acts despite the amendment to the *Criminal Code* in 1954 - see *Speers v. Hagmeister*, *supra* note 53, *Monteith v. Callabine* (1964), 40 W.W.R. 641 (B.C.S.C.) and *Morrison v. Mills & Mills* (1963), 38 D.L.R. (2nd) 489 (Alta.S.C.). It may be of significance that while common law offences can no longer be charged, they have apparently not been abolished - see *Amacher v. Erickson*, *supra* note 54.

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[56] Fleming, *The Law of Torts*, *supra* note 2, at 549.

SUMMARY - STATUS OF LEGISLATION CONSIDERED

1. ACTS OR PROVISIONS OF ACTS THAT HAVE BEEN FOUND TO BE OR THAT LIKELY ARE IN FORCE AS PART OF PROVINCIAL LAW, AND REMAINING ESSENTIAL.

   Fires Prevention (Metropolis) Act, 1774, c. 86*

2. ACTS OR PROVISIONS OF ACTS THAT HAVE BEEN FOUND TO BE IN FORCE, OR THAT LIKELY ARE IN FORCE, BUT ARE NOW OF LITTLE OR NO UTILITY.

   Maintenance Act, (32 Hen. 8)

   Constables Protection Act, 1750

3. ACTS OR PROVISIONS OF ACTS THAT WERE HELD TO BE RECEIVED, OR WHICH WERE LIKELY RECEIVED, BUT SUPERSEDED BY SIMILAR LEGISLATION.

   Fires Protection (Metropolis) Act, 1774, c. 83*

   Libel and Slander Act, 1840, 1843, and 1845

   Fatal Accidents Act, 1846 and 1864

   Justices Protection Act, 1848*

4. ACTS AND PROVISIONS AF ACTS THAT HAVE BEEN HELD NOT TO HAVE BEEN RECEIVED, OR WHICH WERE LIKELY NOT RECEIVED AS PART OF PROVINCIAL LAW.

   Public Officers Act, 1609**

   Offences Against the Person Act, 1861, s. 45**

   Dog's Act, 1865

* Held to be in force by a Saskatchewan court.

** Held not in force by a Saskatchewan court.

CHAPTER VI

EVIDENCE

1. THE ENGLISH BACKGROUND

The law of evidence began to take shape in the decisions of late 17th and 18th century judges.[1] Most of the modern rules of evidence still rest on authority that can be traced back to that era. But some parts of the law of evidence fell prey to the complexity that infected the common law at the beginning of the nineteenth century. The formal requirements for proving documents tendered in evidence were often nearly impossible to meet in practice. Even more indefensible were the "crippling effects upon the court's pursuit of the truth" of the rules relating to competency of witnesses.[2] The courts rejected the evidence of witnesses who could not be sworn because of youth or lack of Christian belief; convicts were presumed to be inclined to perjury and not permitted to testify. An even broader class of witnesses was excluded for want of disinterestedness in the proceedings - the parties and their spouses, and virtually anyone who had a financial interest in the outcome, no matter how remote or small.[3]

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[1] Rupert Cross, *Evidence* (5th ed.), London, 1979, 1.

[2] John Sopinka and Sidney N. Lederman, *The Law of Evidence in Civil Cases*, Toronto, 1974, 447. Both this text and Cross provide summaries of the common law on competency and the statutory response. In defence of the judges of the seventeenth century, it should be noted that restrictive rules of evidence appear to have first been formulated to protect defendants from the excesses of the Court of the Star Chamber- see 9 Holdsworth *Hist. Eng. Law* 177-197.

Jeremy Bentham's scathing critique of the law in *The Rationale of Judicial Evidence* provided impetus to reformers.[4] The competency rules were reformed piecemeal in a series of nineteenth century statutes. At least in regard to civil evidence, the process was complete by reception date.[5] Although the 19th century evidence statutes were primarily concerned with the competence of witnesses, legislation at mid-century also simplified the rules relating to admission of documentary evidence, and addressed a few other miscellaneous matters.

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[3] The rules were not only restrictive, but complex - thus Cross's summary of the law relating to the incompetency of convicts as witnesses:

> ...[A] person who had once been convicted and sentenced for an infamous crime was incompetent as a witness for the rest of his life. A great deal of technicality was involved concerning the definition of an infamous crime which certainly included treason, felony and perjury, while an almost equal amount of learning was devoted to the effect of a pardon. (*Supra* note 1, at 163)

[4] Consider, for example, his sarcastic comments on the exclusion of witnesses due to interest:

> No presumption so slender, which is not, under some established system, taken for conclusive: a fact, notorious provable fact, run counter, it makes no difference. Mendacity is presumed from affection....brother will be for brother, master for servant, servant for master, and so on. What? When you see them fighting one another every day? Is it for his exclusive fondness for Abel that Caine would have been excluded by you?

(*The Rationale of Judicial Evidence*, Book 9 "on the exclusion of evidence", excerpted in Mary Peter Mack, *A Bentham Reader*, New York, 1969, 230.)

[5] Reform took longer to achieve in regard to evidence in criminal cases. The process was not complete until the end of the nineteenth century. (Cross, *supra* note 1, at 163).

(i) Competency of Witnesses

In 1814, ratepayers and office holders were made competent witnesses in cases involving their parish or district.[6] In 1828, convicts were made competent witnesses after they had served their terms, unless they had been convicted of perjury.[7] In 1833, interested persons became competent witnesses (subject to certain limitations).[8] Lord Denman's *Evidence Act*, 1843 was more comprehensive. After reciting that "Whereas the Inquiry after Truth in the Courts of Justice is often obscured by Incapacities created by the present Law", it provided generally that witnesses should not be excluded from giving evidence "by incapacity from crime or interest".[9] Lord Brougham's *Act to Amend the Law of Evidence*, 1851 made parties to civil proceedings competent witnesses.[10] *The Evidence Amendment Act*, 1853 made husbands and wives competent witnesses in proceedings in which their spouses were parties.[11] In 1869, the last restrictions on the competency of parties were removed: The *Evidence Further Amendment Act* provided that the parties to an action for breach of promise to marry could give evidence,[12] and permitted parties to proceedings instituted "in consequence of adultery" and their spouses to give evidence.[13]

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[6] 54 Geo. 3, c. 170, s. 9.

[7] The *Civil Rights of Convicts Act*, 1828, 9 Geo. 4, c. 12.

[8] 3 & 4 Will. 4, c. 42, s. 26. No interested party could take advantage of, or be adversely affected by, the judgment in a case in which he had testified.

[9] 6 & 7 Vict., c. 85, s. 1.

[10] 14 & 15 Vict., c. 99, s. 2.

(ii) Documentary Evidence

The common law rules relating to documentary evidence were relaxed by *Lord Brougham's Act* in 1851, and the *Documentary Evidence Act*, 1868.[14] The 1851 Act permitted reception of documents "without proof of seal or stamp or signature authenticating the same" in an English court in cases in which such documents were admissible in an Irish or colonial court, and vice versa.[15] It expressly dispensed with formalities when foreign and colonial "Acts of State" and judgments,[16] certified copies of public documents,[17] and several other miscellaneous classes of documents[18] were tendered in evidence. The 1868 Act made evidence of "any proclamation, order or regulation" admissible by production of an official copy.[19]

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[11] 16 & 17 Vict., c. 83, s. 1. Sections 2 and 3, however, provided that a spouse could not be compelled to testify against the other in a criminal proceeding, or "to disclose any communication made...during the marriage."

[12] 32 & 33 Vict., c. 68, s. 2.

[13] Section 3. However, the legislation also provided that "no witness in any proceeding, whether a party to a suit or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery...."

[14] 15 Vict., c. 99; 31 & 32 Vict., c. 37.

[15] Sections 9-11.

[16] Section 7.

The *Common Law Procedure Act*, 1854 also contained a provision relating to documentary evidence. At common law, all documents that were attested by witnesses had to be proved by calling a witness to give evidence, whether the document was one required to be attested by law or not. This inconvenient rule was described by Lord Ellenborough as "fixed, formal and universal."[20] Section 26 of the 1854 Act provided relief:

> It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved as if there had been no attesting witness thereto.[21]

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[17] Section 14.

[18] Section 8, certificates of qualification of apothecaries; section 11, registers of British vessels.

[19] Section 2. The legislation was expressly made applicable to "any British colony or possession." However, the legislation cannot be regarded as in force *proprio vigore* in the ordinary sense. Section 3 provided that the Act was to be in force in the colonies "subject to any law that may be from time to time made by the Legislature" of a colony.

[20] *R. v. Harringworth* (Inhabitants) (1815), 4 M. & S. 350. See Cross, *supra* note 1, at 606, where the common law rule and statutory reform are discussed in more detail.

[21] 18 & 19 Vict., c. 7. This provision was reproduced by section 7 of *The Criminal Evidence Amendment Act*, 1865 (28 & 29 Vict., c. 18), which, despite its title, applied in part to civil as well as criminal trials.

(iii) Other Statutory Reforms

The *Common Law Procedure Act*, 1854 contained several sections relating to the cross-examination and impeaching of witnesses,[22] and provided that witnesses objecting to the oath might give evidence by declaration, thus eliminating the last restriction on reception of evidence from non-Christians.[23] Finally, the *Evidence on Commission Act*, 1859 provided a mechanism for taking evidence before examiners outside the jurisdiction where the trial was held, and required all courts in British territories to facilitate the process.[24] The legislation was apparently in force *proprio vigore* throughout the Empire, as was a further *Evidence on Commission Act*, 1885,[25] which added procedural teeth to the earlier system for taking evidence out of jurisdiction.

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[22] Sections 22-25 and 27. These provisions were reproduced in *The Criminal Evidence Amendment Act*, 1865, sections 3-6 and 8.

[23] Section 20. A similar provision also appeared in the *Evidence Further Amendment Act*, 1869, s. 4. A declaration instead of oath had been accepted at common law, however, as early as *Omychund v. Barker* (1745), 1 Atk.

[24] 22 Vict., c. 20. There was earlier legislation of similar character; see 1831, 1 Will. 4, c. 22.

[25] 48 & 49 Vict., c. 74.

2. THE EFFECT OF SASKATCHEWAN LEGISLATION

The Saskatchewan *Evidence Act*, 1907[26] was largely a consolidation of the 19th century English evidence statutes. Although it included a few provisions not derived from the received law,[27] there is a close correspondence between the Saskatchewan Act and its English models.[28]

The provisions of the 1907 Act under the heading "Witnesses"[29] encompassed the provisions of the 1843, 1851 and 1869 Evidence Acts relating to competency of witnesses, the provisions against self-incrimination first contained in the *Witnesses Act*, 1806, and the provisions relating to impeaching witnesses in the *Common Law Procedure*

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[26] S.S. 1907, c. 12. See now, R.S.S. 1978, c. S-16.

[27] See, for example, s. 31 (see now s. 42) permitting a "child of tender years" to give evidence without being sworn "if such child is possessed of sufficient intelligence to justify the reception of the evidence and understand the duty of speaking the truth", and the evidence is corroborated. The provision was apparantly adopted from Ontario. See note 28. In England, the competency of children to give evidence in civil cases is still governed by the common law.

[28] It is likely, however, that the immediate source of the Saskatchewan legislation was Ontario rather than England. The 1843 *Evidence Act* was copied in Upper Canada in 1849, (12 Vict., c. 70). In a series of statutes in 1837 (7 Will. 4, c. 3), 1859 (22 Vict., c. 32), and 1873 (36 Vict., c. 10), the common law rules relating to competency were abrogated in Upper Canada and Ontario. Since the reception date in Ontario was 1792, legislation was necessary to incorporate the English reforms into the local law. Saskatchewan probably adopted an Evidence Act because such legislation existed in Ontario, and despite the fact that the analogous English reforms had become part of the law of Saskatchewan. On the history of evidence legislation in Ontario, see Sopinka and Lederman, *supra* note 2, at 448-449.

[29] Sections 23-30. See now sections 34-41.

Act, 1854. Section 35 of the Saskatchewan Act was identical to the provision of the *Evidence Further Amendment Act*, 1869[30] permitting a witness to make a declaration rather than be sworn. Perhaps surprisingly, however, the Saskatchewan legislation did not include anything analogous to the 1869 legislation absolving a witness from answering questions "tending to show that he or she has been guilty of adultery."

The basic principles of the English statutory reforms of 1851 and 1868 relating to documentary evidence were contained in the parts of the Saskatchewan Act entitled "Public Documents"[31] and "Official and Court Documents".[32] The substance of the *Documentary Evidence Act*, 1868, providing a "mode of proving" proclamations, orders and regulations was reproduced in section 5 of the 1907 legislation.[33] The 1851 Act was not as completely assimilated by Saskatchewan legislation. Some of its provisions relating to documentary evidence were of local application, or applied only to criminal proceedings.[34] Of the three sections of more general application, only two were effectively reproduced in the Saskatchewan Act. Section 4 of the 1907 legislation provided for proof of Imperial proclamations, orders in council and similar documents "in the same manner as they are from time to time proveable in any court in England", just as the 1851 Act made Irish and colonial documents admissible in England under the rules of those jurisdictions. Section 14 of the 1851 Act, providing for admission of copies of public documents, was reproduced in substance in section 12 of the 1907 Act.

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[30] See now section 46.

[31] Sections 4-8. See now sections 4-10.

[32] Sections 9-20. See now sections 11-29.

[33] The quotation is from the marginal note to section 2 of the 1868 Act. Section 5 of the Saskatchewan Act has been adapted to local institutions. Thus, for example, it refers directly to "the production of a copy of the Canada Gazette...".

However, section 7 of the 1851 Act had no analogue in the Saskatchewan legislation. It provided that "all Proclamations, Treaties, and other Acts of State of any Foreign State or of any British Colony, and all Judgments, Decrees, Orders, and other judicial Proceedings of any court of Justice in any Foreign State or in any British Colony..." are provable by certified copy. Similarly, section 26 of the *Common Law Procedure Act*, 1854, relating to attesting witnesses, was not reproduced in Saskatchewan legislation.

Insofar as the subject matter of the *Evidence on Commission Acts* is within the competence of the Saskatchewan Legislature, it was reproduced in the part of the 1907 *Evidence Act* entitled "Commissions issued Abroad".[35] The Saskatchewan legislation is confined to giving recognition to requests to take commission evidence issued by "a court or tribunal of competent jurisdiction in any part of Her Majesty's dominions or in any foreign country". Note that the legislation extends beyond British territory, unlike its English predecessors. On the other hand, it does not authorize the taking of Commission evidence out of Saskatchewan, since the province could not legislate to require other jurisdictions to enforce its orders.[36]

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[34] Section 7 provided for proof of the qualification of an apothecary by production of a certificate issued by the "Society of the Art and Mystery of Apothecaries of the City of London." Section 12 provided for admission of copies of the registers of British vessels and certificates of registry. Section 13 provided for admission of certificates of conviction or acquittal in criminal proceedings. Section 6, relating to inspection of documents, is essentially procedural, and is a precursor to modern discovery.

3. ENGLISH LEGISLATION IN FORCE

(i) Foreign Documents

Section 41 of the 1907 *Evidence Act* provided that "the provisions of this Act shall be deemed to be in addition to and not in derogation of any powers of proving documents given by any existing statute or existing at law."[37] This section would appear to preclude construing the Act as impliedly repealing any English provision relating to documentary evidence not consolidated in the Saskatchewan legislation. Therefore, it would appear that section 7 of the 1851 *Evidence Act*, providing for admission of certified copies of foreign and colonial "Acts of State" and judgments, remains in force in Saskatchewan. That provision was, in fact, held to be in force in Manitoba in *Allen v. Standard Trusts Co.*[38] In that case, the provision was used to admit copies of Articles of Incorporation certified by the Secretary of State of Minnesota, and Certificates of the Register of Deeds also issued in Minnesota. The use to which the provision was put in Manitoba suggests that it is still of some practical value.

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[35] Section 40. See now section 53.

[36] However, rule 289 of the Rules of the Court of Queen's Bench provides that:

> The court may in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the court or any officer of the court, or any other person, and at any place, of any witness or person, and may empower any party to such cause or matter to give such deposition in evidence therein on such terms, if any, as the court may direct.

Thus, as a matter of procedure, the courts in Saskatchewan can provide for the taking of evidence out of the court, whether in Saskatchewan or elsewhere.

(ii) Evidence tending to show Adultery

Section 3 of the *Evidence Further Amendment Act*, 1869 provided that:

> The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery.

Section 24 of the Saskatchewan *Evidence Act*, 1907 provided that "on the trial of any action, matter or proceeding in any court" the husbands and wives of the parties are "competent and compellable to give evidence."[39] The proviso contained in the English Act did not appear in the Saskatchewan legislation, and, in fact, section 26 of the 1907 Act provided that:

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[37] See now s. 54.

[38] [1920] 3 W.W.R. 991.

> No witness shall be excused from answering any question upon the ground that the answer to such question may tend to incriminate him or may tend to establish his liability to a civil proceeding at the instance of the Crown or of any person.[40]

Nevertheless, Rule 624 of the 1921 Rules of Court incorporated the substance of the 1869 prohibition on evidence tending to show adultery. The rule was presumably adopted under the authority of a 1915 amendment to the *Evidence Act* permitting promulgation of "rules of court concerning the admissibility of evidence".[41]

The status of the 1869 provision in Saskatchewan is uncertain. It may be argued that the Rule of Court did no more than recite a rule of evidence established by statute, in which case the rule cannot be said to have replaced the statute. This point of view appears to have been impliedly adopted by Taylor J. in *Lightheart v. Lightheart* [No. 2][42] in 1926. In that case, English authority was relied upon to interpret what was referred to as the "statutory privilege" to refuse to answer questions tending to show adultery. On the other hand, if the rule-making power contained in the *Evidence Act* is construed as broad enough to encompass the substance of the 1869 proviso, the Rule of Court impliedly repealed the English provision, assuming that it was received. It is perhaps worth noting in this context that in a chambers application before trial in *Lightheart v. Lightheart*, Taylor J. was content to deal with the question purely on the basis of the Rule of Court.[43]

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[39] See now s. 35.

[40] See now s. 37. Until criminal conversation was abolished in Saskatchewan, adultery could give rise to a "civil proceeding at the instance of the Crown or of any person."

[41] S.S. 1915, c. 43. See now s. 55.

[42] [1926] 21 Sask. L.R. 294.

It is doubtful that the Rule of Court was valid as a rule made under the *Evidence Act*. On its face, it relates to competency and compellability of witnesses, not admissibility. Nothing in the 1869 legislation or the Saskatchewan Rules of Court precluded a witness from volunteering to answer questions "tending to show adultery". Thus in *Allen v. Allen*, it was held that "[E]vidence with regard to adultery is not rendered inadmissible, but protection is afforded to witnesses from being questioned on the subject if the witness claims protection."[44]

The rule-making power in the *Evidence Act* could sustain the rule if the reference to "admissibility of evidence" is given a wider meaning than it is usually accorded. In other contexts, however, the rule-making power has been construed narrowly. In *Andrews v. Andrews and Roberts*[45], a rule of court that had the effect of denying a divorce to a petitioner who was unable to obtain *vive voce* proof of the respodent's adultery was held to be invalid because it did not establish a rule of admissibility.

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[43] *Lightheart v. Lightheart* [No. 1], [1926] 21 Sask. L.R. 294.

[44] [1894] P. 248. See also *Hebblethwaite v. Hebblethwaite* (1869), L.R. 2, P. 29, 39 L.J. Mat. 15, where Lord Penzance stated that "the general intention was to protect the witness whose evidence was rendered admissible by the statute." These *dicta* were referred to by Taylor J. in *Lightheart v. Lightheart* [No. 2], but he did not apply them to the question of the status of the Rule of Court.

Whether the Rule of Court replaced or merely recited the 1869 English statute was an academic question until 1980. In that year, the old Rule of Court was replaced by a new Rule that effectively reversed the old. Rule 495(1) now provides:

> No plaintiff or defendant spouse shall refuse to answer any question tending to show that he or she had committed adultery where:
>
> (a) (i) such adultery is a ground for the action, particulars of which are set forth in the pleadings,
>
> (ii) such adultery is with respect to a person named in the pleadings,
>
> (iii) a judge is of the opinion that it is or was a cause of or occurred after the separation of the parties,
>
> (iv) a just claim would otherwise be defeated or a party would be deprived of the offence that would otherwise be available....[46]

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[45] [1945] 1 W.W.R. 113 (Sask. C.A.).

[46] There are three separate versions of the present rule. Rule 495 is applicable in matrimonial causes, Rule 617 is applicable in divorce actions, and Rule 641 in proceedings in the Unified Family Court.

If the old rule required the substantive support of the English statute, the new rule cannot be valid.

It may be possible to question the status of the 1869 legislation on other grounds. It was enacted at a time when commission of adultery was actionable as criminal conversation. Its purpose may have been primarily to protect witnesses from liability for criminal conversation. If that is the case, abolition of criminal conversation has made the protection unnecessary. The New Brunswick Supreme Court, commenting on a provision of the Provincial *Evidence Act* identical to the 1869 provision, was of the opinion that "adultery no longer constitutes a criminal offence...the reason for section 8 of the New Brunswick *Evidence Act* has ceased to exist. That section has outlived its usefulness."[47] But even if the 1869 provision died with criminal conversation, the new rules of court relating to evidence of adultery are still likely invalid, since they do not relate to admissibility of evidence.

(iii) Attesting Witnesses

The relief from formal proof of documents attested by witnesses that do not require attestation in law provided by section 26 of the *Common Law Procedure Act*, 1854 was almost certainly received as part of the law of Saskatchewan. Section 22 of the 1907 *Evidence Act* overlaps to some extent with the English provision, providing that "no proof shall be required of the handwriting or official position" of a person who has certified a public document,[48] but it does not fully replace it. It would also appear that Rule 30(1)(c) of the Rules of the Surrogate Court rests on the statutory foundation provided by the 1854 Act. Rule 30(1)(c) is intended to aid the court and executors in identifying cases in which a gift by will is invalid because the beneficiary is an attesting witness. It assumes that in the case of a holographic will (which requires no witnesses), any witness is superfluous and no attestation is required. The Rule provides that a petition for probate shall show, in the appropriate case, that:

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[47] *Andersen v. Andersen* (1978), 21 N.B.R. (2nd) 631.

> ...neither witness is a beneficiary named in the will or a husband or wife of a beneficiary, or if so, that the will is sufficiently attested without the attestation of any such person or that no attestation is necessary.[49]

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[48] See now s. 33.

[49] The 1854 provision did not, of course, apply to wills requiring attesting witnesses. When a will had been probated, and became relevant evidence in other proceedings, it was necessary at common law to prove it again by calling an attesting witness. The *Court of Probate Act*, 1857, s. 64, however, provided that "in any Action...or suit...where according to existing law, it would be necessary to produce and prove an existing will...", no formal proof was necessary if the validity was not contested, and notice of intention to produce the will given. Saskatchewan legislation contains no completely analogous provision, but s. 20 of the 1907 *Evidence Act* (see now s. 26) effectively replaces the English law. Under this section, a certified copy of a will that has been probated may be received in evidence, unless the court requires "other proof".

SUMMARY - STATUS OF LEGISLATION CONSIDERED

1. ACTS OR PROVISIONS OF ACTS THAT ARE LIKELY IN FORCE AS PART OF PROVINCIAL LAW, AND REMAINING ESSENTIAL.

   An Act to Amend the Law of Evidence, 1851, s. 7

   Common Law Procedure Act, 1854, s. 26

2. ACTS OR PROVISIONS OF ACTS THAT ARE LIKELY IN FORCE, BUT ARE NOW OF LITTLE OR NO UTILITY.

   Evidence Further Amednment Act, 1869, s. 3*

   Evidence on Commission Acts, 1859 and 1885**

3. ACTS OR PROVISIONS OF ACTS THAT WERE LIKELY RECEIVED, BUT SUPERSEDED BY SIMILAR LEGISLATION.

   Witness Act, 1806

   Civil Rights of Convicts Act, 1828

   Evidence Act, 1843

   An Act to Amend the Law of Evidence, 1851
   (except as otherwise noted)

   Evidence Act, 1853

   Common Law Procedure Act, 1854, ss. 22-25 and 27

   Documentary Evidence Act, 1868

   Evidence Further Amendment Act, 1869
   (except as otherwise noted)

* Held to be in force in Saskatchewan, but purportedly superseded by a Rule of Court that may not be valid.

** In force *proprio vigore*, but superseded in so far as the subject matter is within Saskatchewan jusisdiction.

CHAPTER VII

STATUTORY OFFENCES AND PENAL LAW

1. INTRODUCTION

Both the civil and criminal law of England on reception date were received as part of the law of Saskatchewan.[1] "Criminal law" within the meaning of the division of powers under the Canadian Constitution came into force as law within the federal jurisdiction; it could be repealed or amended only by the Canadian Parliament. Most of it was rendered inoperative when a new Criminal Code was adopted in 1954.[2] Regulatory offences relating to matters within provincial jurisdiction, however, remain in force as part of provincial law. But because England is a unitary state, the constitutional distinction between criminal law and regulatory offences cannot always be easily applied to English statutes. In the result, it is sometimes difficult to determine whether an English penal statute contains subject matter within federal or provincial jurisdiction.[3]

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[1] On the reception of law within federal jurisdiction, see Part I, chpt. 1, note 3.

[2] The *Criminal Code*, s. 8, now provides that "no person shall be convicted...of an offence at common law...[or] an offence under an Act of Parliament of England...".

Even when offences are created as part of a statutory regime of an essentially civil nature, the constitutional status of the received law may be uncertain: The penal provisions may not be purely regulatory, or may lie in a concurrent field of provincial and federal legislation. In other cases, civil consequences may attach to criminal acts, creating similar constitutional problems. Several English statutes that appear to overlap civil and criminal matters have been discussed elsewhere in this report.[4] Examples that cannot be conveniently classified under other subject headings will be discussed below.

2. STATUTES CONSIDERED

(i) Forcible Entry

Under medieval land law, possession was the principal root of title. But a person out of possession who could claim a "right of entry" through former possession by himself or his predecessors had what Littleton called a "congeable right" to retake possession. In the absence of written documents of title, much less a registry system, the self-help remedy became a problem. Simpson writes that:

> Indeed so common was it for persons to have rights of entry, and to be disposed to take steps to exercise them,

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[3] An excellent discussion of the overlap of federal and provincial jurisdictions in regard to penal provisions is contained in Peter W. Hogg, *Constitutional Law of Canada* (2nd ed.), Toronto, 1985, c. 18.

[4] See, for example, the discussion of *The Offences Against the Persons Act*, *supra*, Part II, chpt. 5.

> that forcible entry on lands became a social problem...and Statutes of Forcible Entry had to be passed to make it a criminal offence to enter on land violently even if the entrant had a right of entry....[5]

The *Statute of Forcible Entry*, 1381,[6] prohibited entry with "a strong hand", or "a multitude of people". But ejection of a dispossessor with force was not always regarded as a forcible entry under the statute, the dispossessor himself being guilty of "forcible detainer" against the rightful possessor. This source of violence was brought under control by the *Statutes of Forcible Entry* of 1429[7] and 1588[8], which provided that there is no forcible detainer when the disposessor had been in possession for more than three years. The last forcible entry legislation, adopted in 1623-24, extended the operation of the earlier Acts to life tenancies.[9]

The legislation has been applied by the courts to all cases involving entry onto land under some colour of right except the dispossession of tenants at will,[10] and trespassers.[11] It came into the modern era primarily as a limitation on the right of a landlord to repossess leased lands and premises.

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[5] A.W.B. Simpson, *An Introduction to the History of Land Law*, Oxford, 1961, 39.

[6] (1381), 5 Ric. 2, st. 1, c. 7, extended by 15 Ric. 2, c. 2.

[7] 8 Hen. 6, c. 9.

[8] 31 Eliz. 1, c. 11.

[9] 21 Ja. 1, c. 15.

[10] See *R. v. Westly and Walker* (1699), 2 Keb. 495, 84 E.R. 311.

The *Forcible Entry Acts* have been held to have been received as part of the law in Canada.[12] Whether they were received as part of the criminal law or as regulatory offences relating to property and civil rights is less certain.[13] Nevertheless, there is little need to retain the statutes as part of provincial law. The *Criminal Code* makes forcible entry and forcible detainer indictable offences.[14] Because forcible entry involves violence against persons and property, it is unquestionably valid subject matter for criminal law. If the received statutes remain part of provincial law, they operate concurrently with the federal legislation; but in that case, they add little or nothing to the *Criminal Code* sanctions.

(ii) Breach of the Peace

Justices of the Peace were the leading royal officials at the local level during the late Middle Ages and Tudor period. The office was

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[11] The trespasser was a forcible detainer, and thus could be removed with reasonable force.

[12] See *Boulton v. Fitzgerald* (1844), 1 U.C.C.B. (C.A.); *Frey v. Fedoruk*, [1949] 2 W.W.R. 605 (B.C.C.A.).

[13] Both the cases referred to in note 12 were decided before the abolition of received English criminal offences in 1954, so that classification of the legislation was not necessary to determine whether the statutes were in force.

[14] Sections 73 and 74.

created by statute in the reign of Edward III.[15] The *Justices of the Peace Act*, 1360 largely superseded (without repealing) the earlier legislation. It provided for appointment of justices, and conferred broad powers on them "for the keeping of the peace".

Justices of the Peace are now appointed under the *Justices of the Peace Act*.[16] Authority to try criminal offences and issue warrants in criminal matters is governed by the *Criminal Code*, and trial of provincial offences is authorized by section 8 of the *Justices of the Peace Act*.[17] Some other parts of the 1360 Act have no modern relevance.[18] Nevertheless, a residue remains that has been held to be in force in Canada. The Act provided that justices "shall have power to restrain the offenders, rioters, and all other barators." This phrase became the foundation for a jurisdiction to bind over defendants to keep the peace. As Lord Goddard noted in *R. v. County of London Quarter Sessions*:

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[15] 1326, 1 Edw. 3, st. 2, c. 16; 1344, 18 Edw. 3, st. 2, c. 2; 1360, 34 Edw. 3, c. 1.

[16] R.S.S. 1978, c. J-5.

[17] Section 8 provides that the Criminal Code provisions relating to summary proceedings "apply to proceedings before justices of the peace under...any law in force in Saskatchewan."

[18] The *English Statute Law Revision Act*, 1948, c. 62 relieved justices of their duty to "inquire of all those that have been pillors and robbers in parts beyond the sea, and now come again and go wandering...", and the *Criminal Law Act*, 1967, c. 58 repealed provisions relating to writs of Oyer and Terminer. The 1948 legislation also repealed the 1326 and 1344 Acts.

> It is said of this statute in *Burn's Justice of the Peace*...that "whatever the natural and obvious sense of it may be when compared with the history and circumstances of those times," (that is, the time when it was passed), "it is certain that it hath been carried much further by construction, and the purport of it hath been extended by degrees, until at length there is scarcely any other statutes which hath received such a largeness of interpretation." This is not at all an uncommon experience when one is dealing with statutes passed in the reigns of the Plantagenets.[19]

The *Criminal Code* now provides that "any person who fears that another person will cause personal injury to him or his spouse or his child or will damage his property may lay an information before a justice", and the justice may require the defendant to "enter into a recognizance...to keep the peace and be of good behaviour...."[20] Under the 1360 Statute, a defendant can be bound over to keep the peace in wider circumstances. In *R. v. Poffenroth*, an Alberta justice required a defendant to enter a recognizance to keep the peace upon a charge that he "did act in a manner likely to cause a breach of the peace by following after and annoying...on a public street..."[21], and in *McKenzie v. Martin*, the Supreme Court of Canada approved an information charging that the defendant "did unlawfully repeatedly call on the telephone [certain persons] thereby causing the said parties...annoyance, loss of sleep, inconvenience and worry, said acts tending toward a breach of the public peace...".[22]

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[19] [1948] 1 All E.R. 72.

[20] Section 745.

[21] [1942] 2 W.W.R. 362.

To the extent that the preventative justice aspect of the 1360 legislation is a matter of criminal law, the Act was apparently not affected by the abolition of common law and English statutory offences. A defendant may be required to enter into a recognizance even though he has committed no offence, and the order to keep the peace is not a conviction.[23] As recently as 1972, the Ontario High Court confirmed the jurisdiction (though calling it a "common law prerogative") and noted that it "has been long recognized in England and the subject of many judgments which are exhaustively reviewed in Canadian reports."[24]

But the 1360 statute appears to lie in a concurrent jurisdiction. Hogg summarizes the division of power between the Federal Government and the provinces in regard to prevention of crime in this manner:

> A law in relation to prevention of crime is within federal competence under s. 91(27): *A- G. Can. v. Pattison* (1981) 123 D.L.R. (3d) 111 (Alta. C.A.) (Criminal Code's gun control provision upheld as preventative); Laskin, *Canadian Constitutional Law* (4th

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[22] [1954] S.C.R. 361. In *R. v. County of London Quarter Sessions*, *supra* note 19, (a case involving eaves dropping), Lord Goddard noted that "in Doulton's *Countrey Justice*, a work of the highest authority, a catalogue is given, not intended, I think, to be exhaustive, of a large number of instances which would justify sureties for good behaviour being taken. He starts with rioters and baraters, and goes on to such cases as night walkers and eaves droppers, suspected persons who live idly and yet fare well, or are well-apparelled having nothing whereon to live, and common gangsters. None of these was ever an indictable offence."

[23] *Ibid.*

[24] *Re Regina and Shaben et al* (1972), 8 C.C.C. (2nd) 422.

> ed) Rev., 175) 825-826. However, the provinces may enact laws with a similar purpose so long as they can be classified as in relation to a provincial matter such as property use *Bedard v. Dawson* [1923] S.C.R. 681 (closing "disorderly" houses); or administration of justice: *DiIorio v. Montreal Jail Wardens* [1978] 1 S.C.R. 152 (inquiring into organized crime); or the regulation of business; *N.S. Bd. of Censors v. McNeil* [1978] 2 S.C.R. 662 (movie censorship); or the regulation of municipal public domain (parks and streets): *A.G. Can. and Dupond v. Montreal* [1978] 2 S.C.R. 770) (temporary prohibition of assemblies and parades).[25]

Thus, while the preventative justice provisions of the 1360 Act likely lie within provincial as well as federal jurisdiction, they would be abolished only if repealed by both levels of government.

(iii) Forfeiture

At common law, conviction for treason or commission of a felony caused the property of the offender to forfeit to the Crown. Section 1 of The *Forfeiture Act*, 1870,[26] abolished forfeiture, but as Kenny noted:

> It did not restore the offender's property free of all liabilities, but justly saddled him with certain burdens which the crime itself had brought about.[27]

The Act provided that during the term of his imprisonment, the offender could not make any disposition of his property, and provided for appointment of an administrator or interim curator to manage the property while the disability subsisted. Canadian legislation had already placed limitations on forfeiture in 1869,[28] and in 1892 the *Criminal Code* abolished forfeiture.[29] The Code provision placed no disability on convicts in regard to their property during imprisonment.

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[25] Hogg, *supra* note 3, at 411.

[26] 33 & 34 Vict., c. 23. The Act was assented to on July 4, 1870.

[27] Ed. J.W.C. Turner, *Kenny's Outlines of Criminal Law* (19th ed.), Cambridge, 1966, para. 75.

For the last 90 years, convicts have been undisturbed in possession of their property in Canada. It has been assumed that convicts have full capacity to make valid contracts and bring civil actions in regard to property rights. Even before 1870, forfeiture had ceased to be of much importance. As Kenny recorded, "most felons were poor: and rich ones disposed of their wealth between arrest and conviction."[30] In 1954, the provision abolishing forfeiture was omitted from the *Criminal Code*. No doubt, it was assumed that deletion of the provision did not revive either the common law or the disabilities contained in the 1870 statute.

Nevertheless, the status of both the *Criminal Code* provisions relating to forfeiture and the *Forfeiture Act*, 1870 have been discussed in several reported decisions with inconsistent and uncertain results.

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[28] *An Act respecting procedure and criminal cases, and other matters relating to criminal law*, S.C. 1869, c. 29, ss. 55-56 (re-enacted R.S.C. 1886, c. 181, ss. 36-37). It stated that except in cases of treason, conviction would not disinherit the heir. A convicted felon forfeited his property to the Crown for his lifetime.

[29] S.C. 1892, c. 29 (R.S.C. 1906, c. 146, s. 1033). Section 965 of the 1892 Code reproduced s. 1 of *Forfeiture Act*, 1870, except that it substituted the phrase "indictable offence" for "felony" and omitted a reference to outlawry.

[30] Kenny, *supra* note 27, para. 77. The annual amounts received from forfeiture between 1848 and 1870 ranged from 253 pounds to 1,317 pounds.

On one hand, forfeiture can be regarded as part of the penalty assigned to a felony. Parliament appears to have assumed as much when it dealt with forfeiture in 1869 and 1892. On the other hand, there is almost certainly a valid provincial aspect to forfeiture. It had its origin as part of feudal land law.[31] Little can be said with certainty beyond those propositions.

The first reported Canadian decision on forfeiture antedates the Criminal Code provision of 1892. In *Dumphy v. Kehoe*, Sir Louis Jette held that the *Forfeiture Act*, 1870 was not part of the law of Quebec, and that the 1869 federal legislation relating to forfeiture was *ultra vires*.[32] The first proposition is, of course, almost certainly correct since the 1870 legislation could have been in force in Quebec only *in proprio vigore*. The second proposition is more debatable. Jette reached it primarily on the ground that forfeiture is equivalent to the "civil death" recognized in the civil law inherited by Quebec and thus to be characterized as a matter of "property and civil rights" within provincial jurisdiction.[33] In *Young v. Carter*, the first reported decision after the *Criminal Code* was adopted, the Ontario High Court approved the ruling in *Dumphy v. Kehoe* that the *Forfeiture Act*, 1870 was not in force *proprio vigore*. Mr. Justice Boyd also apparently accepted the contention that the 1869 legislation was *ultra vires*, but without giving reasons, held the 1892 Criminal Code provision to be *intra vires*.[34]

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[31] See Megarry and Wade, *The Law of Real Property* (4th ed.), London, 1975, 992-993. At common law, the land of a felon technically escheated to the feudal lord (subject to the Crown's right to enjoy it for a year and a day), although goods forfeited directly to the Crown.

[32] (1891), 21 Rev. Leg. 119 (Que. S.C.).

[33] See also *Binder v. Blais*, [1952] Que. Q.B. 621, in which "civil degradation" (loss of civil and political rights), also recognized by the civil law, was characterized as a civil consequence decreed by provincial law to result from criminal conviction.

Decisions in western Canada have been inconsistent. In *Re Noble Estate*, a Saskatchewan decision, the status of the English Act was dealt with incidentally.[35] Judge Gravel was of the opinion that:

> If that Act [the *Forfeiture Act*, 1870] was in force here, I would have to call the attention of the proper authorities to this application, but I remember that Sir Louis A. Jette taught us at the Faculty of Law of Laval University, in accordance with his own previous decision in *Dumphy v. Kehoe*...that the said Imperial statute is not in force in Canada.

Whether Judge Gravel intended to imply as well that federal legislation relating to forfeiture is *ultra vires* is unclear. It is clear, however, that the judge did not address his mind to the difference between Saskatchewan and Quebec reception dates.

The 1870 Act was also considered incidentally in Manitoba in *Cooke v. Westgate*[36]. In that case, Chief Justice Robson expressed the opinion that the *Forfeiture Act*, 1870 applied in Manitoba. But the court failed to consider the full implications of its decision. The circumstances of the case were unusual: the 1870 Act was resorted to only to prevent service of civil process on a condemned prisoner on the basis that his estate was forfeit. Nothing in the decision, however, indicated whether the Chief Justice believed the provision to be in force as part of the criminal law (presumably operating in addition to the Criminal Code provision), or as part of the law within provincial jurisdiction.

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[34] (1912), 5 D.L.R. 655.

[35] [1927] 1 W.W.R. 938 (Sask. Surr. Ct.).

[36] [1944] 4 D.L.R. 309 (C.A.).

If forfeiture is a matter within provincial jurisdiction, the 1870 legislation remains in force. Without section 1 of the *Forfeiture Act*, the property of felons would presumably be forfeit under the common law. While it is more likely that forfeiture is a matter within federal jurisdiction, and thus was abolished by the *Criminal Code*, it may be unsafe to regard the 1870 Act as a dead letter. So much of the Act as is required to insure that forfeiture no longer exists should be retained in provincial law.

(iv) Gambling

At common law, gambling was not illegal. A wager was regarded as a perfectly valid contract for which there was adequate consideration.[37] "Excessive" gaming, however, attracted the attention of Parliament at least as early as the reign of Henry VIII. Criminal sanctions aimed at particular forms of gambling and suppression of gaming houses were enacted in a series of statutes from 1541 to reception date,[38] and provided the foundation for the Criminal Code provisions relating to "gaming and betting".[39] In addition, Parliament attached civil consequences to gambling that substantially altered the common law.

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[37] See *Bailey v. McDuffee* (1878), 18 N.B.R. 26 (C.A.).

Until the Victorian era, Parliament appears to have been primarily concerned with the evils thought to accompany gambling on credit. *An Act against deceitful, disorderly and excessive gambling*, 1664[40] provided that a gambling debt in excess of 100 pounds could not be enforced by legal action. The *Gaming Act*, 1710[41] was considerably more restrictive. Section 1 provided that "all notes, bills, bonds, judgments, or other securities or conveyances whatsoever" given for gaming consideration or for reimbursement of "any money knowingly lent or advanced for such gaming or betting as aforesaid" were utterly void. Section 2 effectively reduced enforceable winnings to ten pounds. Because securities used to pay gambling debts were void under the 1710 Act, a holder in due course who acquired such a security was not protected, even if he had acquired it in good faith for valuable consideration. To correct this anomaly, the *Gaming Act*, 1835, after reciting the 1710

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[38] 1541-42, 33 Hen. 8, c. 9 appears to be the earliest gaming statute. The *Gaming Act*, 1845, 8 & 9 Vict., c. 109 consolidated much of the earlier law.

[39] *Criminal Code*, ss. 185-192.

[40] 16 Cha. 2, c. 7.

[41] 9 Ann., c. 9 (Canadian courts have tended to cite this Act from Ruffhead's edition of the statutes, where it is identified as 9 Ann., c. 14).

Act, provided that:

> So much of the hereinbefore recited Acts...as enacts that any note, bill, or mortgage shall be absolutely void, shall be, and the same is hereby repealed: but nevertheless, every note, bill or mortgage which if this Act had not been passed would, by virtue of the [recited Acts] have been absolutely void, shall be deemed to be taken to have been made, drawn, accepted, given or executed for an illegal consideration....[42]

The legislation also permitted the loser of a bet who had given a security in satisfaction of the debt to recover from the winner.

The Victorian era was less tolerant of gambling. The *Gaming Act*, 1845[43] was primarily a criminal statute, but section 18 of the Act made all wagering contracts void:

> Every contract or agreement by way of gaming or wagering is void, and no suit shall be brought or maintained for recovering any sum of money or valuable thing alleged to be won on a wager....

The 1664 Act and section 2 of the 1710 Act were also repealed.[44]

The law of wagering contracts as it stood in 1845 was received as part of the law of Saskatchewan. Section 1 of the *Gaming Act*, 1710, as amended in 1835, was held in force by the Court of Appeal in *Goggins v.*

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[42] 5 & 6 Will. 4, c. 41.

[43] *Supra* note 38.

[44] Section 15. For a summary of the state of the law after 1845, see J. Falconbridge, "More Anomalies in the Law of Wagering Contracts" (1931), 9 Can. Bar Rev. 335-336.

Morrison,[45] and section 18 of the *Gaming Act*, 1845 was held in force in a district court decision in *Dejardin v. Roy*.[46] Similar decisions have been reached in Alberta[47] and Manitoba[48]. Any doubt that the provisions of gaming legislation relating to negotiable instruments are within provincial jurisdiction were resolved by the Supreme Court of Canada in *McGillis v. Sullivan*.[49] Ontario, which received only the 1664 and 1710 legislation, has adopted its own *Gaming Act*, incorporating the 1835 and 1845 statutes.[50]

The *Criminal Code* has an indirect effect on wagering contracts. Section 189(5) provides that all property "sold, lent, given, bartered, or exchanged" in a prohibited lottery or by other "mode of chance" is forfeited to the Crown, subject to section 189(6), which protects "any *bona fide* purchaser for valuable consideration without notice." More generally, any wagering contract that is prohibited under the *Criminal Code* will be an illegal contract apart from the *Gaming Acts*. But the scope of the *Criminal Code* is considerably narrower than the *Gaming Acts*, applying only to games of chance, betting on horse races outside an approved para-mutual system, unauthorized lotteries, and "common gaming houses." Section 1 of the *Gaming Act*, 1710, the *Gaming Act*, 1835, and section 18 of the *Gaming Act*, 1845 are significant, if rarely applied, parts of the law of Saskatchewan.

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[45] [1925] 2 W.W.R. 75.

[46] (1909-10), 12 W.L.R. 704.

[47] *Kadiuk v. Pawliuk* (1958), 25 W.W.R. (N.S.) 321 (Alta. C.A.); *Breitmeir v. Batke* (1966), 56 W.W.R. (N.S.) 678 (Alta. D.C.).

[48] *Hammer v. Finkelstein*, [1931] 1 W.W.R. 769 (Man. C.A.).

[49] [1947] O.R. 650, affirmed [1949] S.C.R. 201.

[50] R.S.S. 1980, c. 187. Although Ontario has adopted the general prohibition on wagering contracts contained in the 1845 Act, it has retained the 1710 provision permitting recovery of excess losses (substituting $40 for 10 pounds) that was repealed in England in 1845.

(v) Sunday Observance

The *Sunday Observance Acts*, 1625 and 1677[51] and the *Holidays Act*, 1552[52] appear to have been received in Canada.[53] The 1552 Act gave statutory recognition to holy days including Sunday. The 1625 Act prohibited sports and pastimes on Sunday, and the 1677 Act prohibited carrying on most forms of business on Sunday.

The federal *Lord's Day Act*[54] contains prohibitions similar to those in the 1625 and 1677 Acts. Since the *Lord's Day Act* was found to violate the *Charter of Rights and Freedoms* in *R. v. Big M Drug Mart*,[55] the received legislation almost certainly violates the *Charter* as well.

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[51] (1625) 1 Cha. 1, c. 1; (1677) 29 Cha. 2, c. 7. See also Lord's day legislation of 11 & 12 Vict., c. 49 (sale of alcohol); 13 & 14 Vict., c. 43 (fairs and markets); and 21 Geo. 3, c. 49.

[52] 5 & 6 Edw. 6, c. 3.

[53] The 1625 Act was, on its own terms, in force *proprio vigore*. On reception of the 1677 Act, see below, note 57.

[54] R.S.C. 1970, c. L-34.

[55] [1985] 1 S.C.R. 295.

For that reason, it is unnecessary to review the status of the received Sunday observance legislation in detail.

It should be noted, however, that while the Privy Council held in *A.G. Ontario v. Hamilton Street Railway*[56] that enforcement by penalty of observance of the Sabbath is a matter of criminal law, the *Sunday Observance Act*, 1677 remained in force for certain purposes after adoption of the federal legislation.[57] In particular, the *Lord's Day Act* made an exception for activities permitted on Sunday under "any Provincial Acts or law now or hereafter in force". It was held that activities permitted on Sunday under the received law amounted to exceptions within provincial law for the purposes of applying the *Lord's Day Act*.[58] The *Lord's Day (Saskatchewan) Act*[59] now sets out the exceptions for that purpose, however. Since the adoption of the provincial legislation in 1965,[60] the *Sunday Observance Act* has not been in force in the province.

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[56] [1903] A.C. 524 (P.C.).

[57] *Young v. Taylor*, [1921] 3 W.W.R. 882 (Man. K.B.); *R. v. Wright* [1929] 1 W.W.R. 917 (Alta. D.C.); *Beaumont v. Posternak*, [1929] 2 W.W.R. 487 (Man. C.A.); *Northwest Life Assurance Company v. Kushnir*, [1922] 1 W.W.R. 962 (Sask. D.C.).

[58] In *Young v. Taylor*, *Supra* note 57, for example, a contract for sale of land executed on Sunday was held to escape the prohibitions in the *Lord's Day Act* because the 1677 Act "has been held not to apply to farmers so that the transaction in the present case which occurred on Sunday between Taylor and Hanson, both of whom are described as farmers, would not be affected."

[59] R.S.S. 1978, c. L-2.

[60] (1965), c. 92.

(vi) Sale of Offices Acts

The *Sale of Offices Acts*, 1552 and 1809 prohibited the sale of public offices.[61] Although the 1809 Act was held to be in force in Canada,[62] it is doubtful that the legislation is still in force.

In *R. v. Mercer*, the Court of Queen's Bench of Upper Canada held the 1809 Act to be criminal law.[63] The legislation declared the sale of a public office to be illegal, and thus presumably an offence. It is arguable, however, that the legislation also has a civil aspect. Section 2 of the 1809 Act declared that an improperly procured appointment immediately vests in the Crown, and the legislation has usually been applied to void contracts rendered illegal by it.[64] But whether there is a civil aspect to the legislation or not, it is of no practical significance. Sections 113 and 114 of the *Criminal Code* make the selling or purchasing of offices and the influencing of appointments to offices offences. Any contract for that purpose would constitute an illegal contract, and therefore be unenforceable.

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[61] (1552), 5 & 6 Edw. 6, c. 15; (1809), 49 Geo. 3, c. 126. The 1809 Act did not repeal the 1552 Act, but repeated most of its provisions.

[62] *R. v. Mercer* (1859), 17 U.C.Q.B. 602; *Stratford v. Wilson*, [1885] 80 O.R. 104; *Smart v. Dana* (1903), 5 O.L.R. 451.

[63] *Supra* note 62.

[64] E.g. *Stratford v. Wilson*, *supra* note 62, in which a contract between a municipality and a constable requiring the constable to "kick back" a portion of the fees he collected to the municipality was held to be illegal.

SUMMARY - STATUS OF LEGISLATION CONSIDERED

1. ACTS OR PROVISIONS OF ACTS THAT HAVE BEEN FOUND TO BE OR THAT ARE LIKELY IN FORCE AS PART OF PROVINCIAL LAW, AND REMAINING ESSENTIAL.

   Justices of the Peace Act, 1360

   Gaming Act, 1710 (as amended by the Gaming Acts, 1835 and 1845)*

   Gaming Act, 1835*

   Gaming Act, 1845, s. 18*

2. ACTS OR PROVISIONS OF ACTS THAT HAVE BEEN FOUND TO BE IN FORCE OR THAT LIKELY ARE IN FORCE, BUT ARE NOW OF LITTLE OR NO UTILITY.

   Statutes of Forcible Entry, 1381, 1429, 1588*

   Sale of Offices Acts, 1552 and 1809**

   Forfeiture Act, 1870**

3. ACTS OR PROVISIONS OF ACTS THAT WERE HELD TO BE RECEIVED, OR WHICH WERE LIKELY RECEIVED, BUT SUPERSEDED BY SIMILAR LEGISLATION.

   Holidays Act, 1552

   Sunday Observance Acts, 1625 and 1677*

* Held to be in force by a Saskatchewan Court.

** These statutes may have both federal and provincial aspects, but retain little practical utility as part of provincial law. Some doubt may remain in this regard with respect to the Forfeiture Act, 1870, however.

CHAPTER VIII

PROCEDURE

1. BACKGROUND

Since the courts have tended to avoid finding procedural provisions in English statutes to be in force on this side of the Atlantic,[1] a somewhat different approach to procedural statutes than to other English statutes is justified. In the review which follows, speculation on the question of reception has been avoided wherever possible. Instead, attention has been focussed on the handful of procedural statutes that have been expressly considered in Saskatchewan decisions.[2]

Procedure generally requires no statutory foundation. The courts have inherent jurisdiction over procedural matters, and rule-making power is conferred by statute. On the other hand, it is clear that when a statute expressly sets out procedures, the court's authority to determine procedure is ousted.[3] It is undesirable to retain English procedural statutes as part of the law of Saskatchewan: the legislation may operate as a fetter on the court's ability to adapt procedural law to changing circumstances. For that reason, it is appropriate to ignore any statutory foundation for the rules of procedure that may exist in the received law, except where the courts have consistently recognized the statute as the basis for the procedure.[4]

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[1] See above, pp. 42-43.

[2] Procedure in surrogate matters is discussed in Part 2, chpt. 3 and procedure under the prerogative writs in Part II, chpt. 9. In addition, some miscellaneous procedural provisions are discussed elsewhere in this report - for example, the abolition of real actions (pp. 65-67), and the impact of procedural reforms on debtor-creditor law (pp. 140-143).

The history of procedural law reform in England lends support to the approach adopted here. Until the 18th century, Parliament enacted procedural requirements only incidentally.[5] The *Administration of*

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[3] See *In re Barclay and Barclay*, [1922] 1 W.W.R. 53 (Alta.C.A.), in which it was held that a rule of court in conflict with a statute "must be set aside as invalid".

[4] This approach is appropriate only to the extent that a rule of court does not contain matters of substance as well as procedure. *The Queen's Bench Act* authorizes the courts to make rules only "for regulating the pleading, practice and procedure in the court," and other essentially procedural matters (*The Queen's Bench Act*, R.S.S. 1978, c. Q-1, s. 89). Substantive content in a rule made pursuant to *The Queen's Bench Act* can do no more than recite propositions otherwise supported by common law or statute. But see p. 219 below in regard to the Territorial Rules of Court.

[5] Many medieval statutes have an essentially procedural form, but are substantive rather than procedural in the modern sense. A clear distinction between procedure and substance was not made by English lawyers until the 19th century. The Forms of Actions that did so much to mould the development of the substantive law created rights by defining procedures. See F.W. Maitland, *The Forms of Actions at Common Law*, Cambridge, 1968. The Forms of Action were probably statutory in origin. Maitland records that "there is good reason to believe that Henry [II] in some Ordinance lost to us, laid down the broad principle that no man need answer for his freehold without royal writ" (*Ibid.*, at 33). Writs were freely created thereafter, but sometimes regulated by statute. For example, the *Statute of Marlbridge*, 52 Hen. 3, c. 29 created several new writs of entry.

Justice Acts of 1696 and 1705[6] remedied a few procedural and substantive inadequacies of the law, but it was not until the Victorian era that procedural reform was attempted on a significant scale. To legislators of the Age of Reform, practice in the courts was needlessly complicated and obscure. Pleading in the courts of law was a science replete with technicalities within technicalities, requiring infinite attention to detail.[7] Chancery was perhaps even more in need of reform, a state of affairs mercilessly satirized by Dickens in *Bleak House*.[8]

As a matter of history, only legislative intervention could break the Gordian knot the courts had created. Procedural reform began in 1832-33 with the abolition of real actions and the first attempts at procedural simplification.[9] The Reports of Her Majesty's Commissioners for Inquiry into the Process, Practice and System of Pleading were implemented in the *Common Law Procedure Acts* between 1852 and 1860[10], completely remaking the old system of pleading. The inadequacies of the Courts of Equity were attacked by the *Chancery Procedure Amendment Acts* of 1852 and 1858.[11]

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[6] (1696) 8 & 9 Will. 3, c. 11; (1705) 4 & 5 Ann., c. 3.

[7] On the history of pleading, see W. Blake Odgers, The Principles of Procedure (5th ed.), London, 1903, 72.

[8] See H.G. Hanbury, *English Courts of Law* (3rd ed.), London, 1960, 140.

[9] The real actions were abolished by the *Real Property Limitation Act*, 1833, 3 & 4 Will. 4., c. 27, s. 36 (see above, pp. 65-67). The *Unification of Process Act*, 1832, 2 & 3 Will. 4., c. 33 made uniform the "original" and "mesne" processes that had been an inherent part of the old writs.

The *Civil Procedure Act*, 1833, 3 & 4 Will. 3, c. 42 was largely concerned with limitation periods, and was repealed in Saskatchewan in 1932 (S.S. 1932, c. 18, s. 45. See below Part II, chpt. 10, "Limitation Periods"). However, the Act also dealt with some other matters, including pre-judgment interest. The interest provision was re-enacted in the Saskatchewan *Judicature Act*, 1907, ss. 36-39, and carried over into *The Queen's Bench Act*. The identity of the 1833 and 1907 provisions was recognized by the court in *Piedmontese Breeding Co-operative v. Madill* (1985), 40 Sask. R. 144 (Sask. C.A.).

Nineteenth century procedural reform was completed by the unification of the Courts of Law and Equity by the *Judicature Act*, 1873.[12] Part of the effort of procedural reform prior to 1873 had been designed to avoid the need to proceed in both Courts of Law and Equity to obtain adequate remedies.[13] The Rules of Court promulgated under the *Judicature Act* superseded that aspect of the earlier reforms by creating new procedures based on former practice at both law and in equity. But the Rules did more than that. As Maitland wrote, "by [the Judicature Acts] and by the Rules of the Supreme Court made thereunder a new code of civil procedure was introduced, largely dependent for its working on wide discretionary powers allowed to the judges."[14] The statutory reforms of the Victorian age placed procedure on a new footing, but after 1873 Parliament was once again content to leave it to the courts to work out the consequences of the reforms through Rules of Court made by the judges themselves. The work of the reforms was largely to clear the deck, abolishing what the courts themselves apparently could not. When the new rules were promulgated under the *Judicature Act*, the reform statutes were essentially spent.

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[10] (1852), 15 & 16 Vict., c. 76; (1854), 17 & 18 Vict., c. 125; (1860), 23 & 24 Vict., c. 126. On the work of the Commissioners, see Odgers and Odgers, *Bullen and Leake's Precedence of Pleading* (7th ed.), London, 1915, vii.

[11] (1852), 15 & 16 Vict., c. 86; (1858), 21 & 22 Vict., c. 27. There is no need for present purposes to exhaustively list procedural statutes in force in England in 1870. In addition to the Acts mentioned elsewhere in this chapter, however, reference might be made to the *Court Procedure Act*, 1859, 12 & 13 Vict., c. 45 and the *Arbitration Act*, 1698, 9 & 10 Will. 3, c. 14. These Acts have been superseded by the *Arbitration Act*, R.S.S. 1978, c. A-24.

2 Hen. 4, c. 7 and 14 Geo. 2, c. 17 are examples of English statutes held to be in force in Canada at an early date (*Grant v. Protection Ins. Co.*, 1 N.S.R. 12; *Doe d. Hanington v. McFadden* (1836), 2 N.B.R. 153) that were superseded by later developments. Both relate to non-suit in the now obsolete sense of a motion based on a defect in pleading. Both were repealed in England after reception date 42 & 43 Vict., c. 59).

[12] 36 & 37 Vict., c. 66.

[13] For example, the *Common Law Procedure Act*, 1852 permitted redeption in foreclosure actions, a step formerly available only in equity (see above, p. 52). In a unified court, that provision became redundant. Similarly, s. 3 of the *Chancery Procedure Amendment Act*, 1858 (*Lord Cairn's Act*) permitted Courts of Equity to award damages (formerly a remedy only at law) in lieu of specific performance and injunction. As interpreted by the courts, however, damages awarded under *Lord Cairn's Act* were not identical to the damages available at law, so the legislation survived the unification of the courts. See S.M. Waddams, *The Law of Damages*, Toronto, 1983, 76. Section 3 of the Act is no longer in force in Saskatchewan, having been superseded by an almost identical

Because the first Rules of Court in Saskatchewan were copied from the English rules, it is important to fully appreciate the impact which the Rules had in England.[15] Two examples may be useful to clarify the effect

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provision in *The Queen's Bench Act*, s. 45, Rule 9.

[14] Maitland, *supra* note 5, at 65.

[15] The first Rules of Court in the Territories were contained in "An Ordinance respecting the Administration of Civil Justice, "O.N.W.T. 1886, No. 2 (consolidated by C.O.N.W.T. 1898, c. 21). The rules were based on the English *Rules of the Supreme Court*, promulgated in 1883, as amended to the date of the Ordinances. The Saskatchewan *Judicature Act*, S.S. 1907, c. 8, s. 55 confirmed the Rules of Court in force in the Territories. The first Saskatchewan rules made by the judges pursuant to the 1907 Act came into force on January 1, 1912. As late as the 1961 revision of the rules, notes to the rules indicated the English rule upon which corresponding Saskatchewn rules were based. On the history of the rules in Saskatchewan, see Neva R. McKeague and Willa M.V.

of the Rules. First, consider the final reckoning with the old Forms of Action. It was still necessary after 1833 to specifically plead the Forms of Action not abolished in that year in the precise language contained in the old writs. The *Common Law Procedure Act*, 1852 made it unnecessary to refer to the Forms of Action or to use the old language.[16] The 1852 legislation did not abolish the Forms of Actions, however.[17] They met their end after the unification of the courts, not by express statutory abolition, but because the new Rules of Court made recourse to the old writs unnecessary for any purpose. In the result, the statutory attack on the Forms of Action that had prepared the ground for the Rules of Court became largely of only historical interest.

Second, consider the fate of the *Statutes of Set-off* of 1728 and 1735.[18] The circumstances in which set-off would be permitted in actions in the Courts of Law were governed by rigorous application of the Statutes. Before their adoption, set-off was not permitted at all at

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Voroney, *The Queen's Bench Rules of Saskatchewan: Annotated*, Saskatoon, 1985, 1.

[16] Section 3.

[17] "But even after this Act, the Form of Action remains of vital importance to the pleader for each action retains its own precedents, and although the choice of the proper Form of Action need no longer be made in the choice of writ, it is merely deferred until the declaration". (Maitland, *supra* note 5, at 65).

[18] (1728) 2 Geo. 2, c. 22; (1735) 8 Geo. 2, c. 24.

law.[19] The Courts of Chancery adopted a more flexible practice, and allowed set-off in cases which were within the spirit, if not the actual wording, of the Acts.[20] The *Judicature Act*, 1873 gave the courts the right to grant "all such relief against the plaintiff as such defendant might have had if he had brought an action against the plaintiff for that purpose."[21] The Rules of Court made under that section specifically dealt with the right of set-off.[22] Set-off remained essentially what it had been under the Statutes, modified by the practice in equity.[23] However, the *Judicature Act* and the Rules made it unnecessary to retain the *Statutes of Set-off* themselves. They were repealed by the *Law Revision and Civil Procedure Act*, 1883.[24] Once again, the Rules effectively superseded earlier statutory reforms.

In Saskatchewan, the Rules of Court may have had even more impact on the procedural reforms made prior to 1870. The Territorial Rules of

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[19] For discussion of the *Statute of Set-off* and their predecessors, see 25 Hals. (lst) para. 859.

[20] For example, the Courts of Equity allowed a set-off in cases where one debt was equitable and the other legal, while the Courts of Law would not. See, for example, *Cavendish v. Greaves*, 24 Beav. 163.

[21] Section 24(3).

[22] The Rules of the Supreme Court, 1883, O. 19, r. 2 (Rule 199).

[23] See the "note on set-off and counterclaim" in Snow, Burney and Stringer, *The Annual Practice*, 1906, London, 1906, 271: "A set-off remains precisely what a set-off used to be under the Statute of 2 Geo. 2, c. 22; and every other kind of cross-claim is a counterclaim."

[24] 46 & 47 Vict., c. 49, s. 4.

Court were based on the English model, but given the force of statute because they were adopted by Ordinance.[25] In 1925, Chief Justice Haultain expressed the opinion in *Imperial Bank of Canada v. Annable Co. Ltd.*[26] that the Judicature Ordinance "virtually repealed" the *Statutes of Set- off*. Although the majority of the court was able to resolve the case without considering the effect of the Judicature Ordinance, Chief Justice Haultain's approach receives considerable support from a more recent Manitoba decision, *Osachuk v. Osachuk.*[27] Until 1931, the Rules of Court in Manitoba were published together with judicature legislation, which provided that the rules "appended thereto are a portion of this Act."[28] After reciting that a rule is ordinarily invalid if it conflicts with a received statute, the court concluded that a rule made prior to 1931 "is in a very different position", since "though it was made by the judges, its provisions did not originate with them."[29]

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[25] See above, note 15.

[26] [1925] 1 W.W.R. 588 (Sask. C.A.).

[27] [1971] 2 W.W.R. 481 (Man. C.A.).

[28] See *The Queen's Bench Act*, S.M. 1895, c. 6, s. 96. The practice was changed with adoption of *The King's Bench Act*, S.M. 1931, c. 6.

[29] Rules of Court have also been confirmed by statute in Alberta from time to time. For example, section 38 of the *Judicature Act*, R.S.A. 1955, c. 164 declared the consolidated Rules of Court to be in "full force and effect". But because this formula did not incorporate the rules into the statute directly, it may not be entirely analogous to the situation in Manitoba and Saskatchewan. In *Patison v. Rowan and Cuthill* (1919), 15 Alta. L.R. 74, it was held that statutory confirmation was intended to confirm the rules "simply as rules of procedure". However, in *Smith v. Kristie et al*, [1920] 3 W.W.R. 585, it was said that:

Until 1978, the Saskatchewan Rules of Court retained most of the rules originally promulgated by the Territorial Ordinance.[30] For that reason, many of the older Rules of Court may remain valid even if they contain substantive content, or conflict with English procedural statutes in force in 1870.

2. PROCEDURAL STATUTES CONSIDERED

(i) Set-off

Set-off of a claim by a defendant against a plaintiff is now governed in Saskatchewan by the Rules of Court. Rule 104A defines the circumstances in which set-off is permitted. It is essentially a restatement of set-off in the courts of law under the *Statutes of Set-off*, 1728 and 1735,[31] and in the Courts of Equity prior to the Judicature Acts.[32] As such, the rule codifies the practice under the

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> When the Legislature declares a rule to have been in force from a certain date, it seems to me to be rather too refined a treatment of language to suggest that it was intended that it should be inforce qua rule, and if it could validly had been originally enacted by the rule-making authority.

See the Alberta Institute of Law Research and Reform, *Validity of the Alberta Rules of Court*, Report No. 15, December, 1974.

[30] Many of the older rules were substantially altered by the Rules Committee's "extensive revisions under the Chairmanship of Mr. Justice K.R.N. MacLeod "between 1978 and 1985 (McKeague and Voroney, *supra* note 15, at 1).

[31] *Supra* note 18.

[32] See the discussion in McKeague and Voroney, *supra* note 15, at 121.

English rules adopted in 1883 and introduced into Saskatchewan by the *Judicature Ordinance*, 1886.[33]

In *Imperial Bank of Canada v. Annabel*, Mr. Justice Lamont, delivering the majority opinion, held that "a right of set-off is a creation of statute", and that the substance of the law had not been affected by the *Judicature Act* or the Rules of Court made under it:

> The great weight of authority in England appears to be that no new right of set-off was given by the *Judicature Act* or the rule.... This rule must be construed as giving a right of set-off only in cases where...it would have been allowed under the statute.[34]

But assuming that the *Statutes of Set-off* were received and remain part of the law of Saskatchewan, the question remains whether they remain an essential foundation for the Rules of Court relating to set-off. If set-off is purely a procedural matter, the Rules of Court do not require statutory support. As noted above, the statutes have been repealed in England. The only provision that can be described as statutory authority for set-off in England after repeal of the statutes is the *Judicature Act*, 1873, which provided that the courts have authority "to grant to any defendant...all such relief against any plaintiff...as such defendant shall have properly claimed in his pleadings."[35] Rule 3 of section 44 of *The Queen's Bench Act* reproduces that provision word for word.[36] It would appear that the *Statutes of Set-off* can be safely ignored in Saskatchewan.

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[33] See above note 15. The older rules permitted set-off but did not elaborate the circumstances in which it was permitted.

[34] *Supra* note 26.

(ii) Costs

The *Statute of Gloucester*[37] and later medieval statutes established the rule that costs are to be awarded to the successful party in an action in the common law courts. The Court of Chancery, on the other hand, claimed an absolute discretion in regard to costs.[38] The rigours of the common law rule were modified to some extent by later statutes. Perhaps most importantly, the *Administration of Justice Act*, 1696[39] gave costs to a successful defendant where the plaintiff had succeeded against other defendants in the same action, and provided for costs on non-suit and upon appeal.[40] The *Judicature Act*, 1873 was silent on the question of costs, but the rules promulgated under it provided that:

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[35] *Supra* note 12, s. 24(2). The marginal note refers only to "counterclaim and third parties", but the provision apparently authorizes both counterclaim and set-off rules. See Snow, Burney and Stringer, *The Annual Practice*, 1906, London, 1906 "note on set-off and counterclaim", at 271.

[36] *Supra* note 4.

[37] 6 Edw. 1, c. 1.

[38] See *Burgess v. Davis* (1936), 2 D.L.R. 532.

[39] *Supra* note 6.

[40] These costs rules were confined, however, to actions of trespass, false imprisonment, assault and *ejectione firmae* (ejectment of a tenant for a term of years). There were, in addition, a few other miscellaneous statutes relating to costs: for example, 43 Eliz. 1, c. 6 dealt with costs in frivolous suits (see *Kelly v. Jones*, 7 N.B.R. 473), and 21 Ja. 1, c. 16, s. 6 provided a special rule for costs in slander actions. A number of

> Subject to the provisions of this Act, and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge....[41]

Whether costs rules are properly regarded as purely procedural is open to question.[42] However, the distinction between procedure and substance may not be of much practical significance. After 1873, the rigidity of the common law costs rules was replaced by the discretion favoured by equity. Under the *Judicature Act*, 1873, equity took precedence over law in cases of conflict. The cost rules adopted after 1873 confirmed the primacy of equity, and rested upon it. The status of statutory costs rules appears to have remained in doubt, however. The *Judicature Act*, 1890 attempted to resolve the issue, providing that awards of costs were to be "subject...to the express provisions of any statute, whether passed before or after the commencement of this Act."[43] The courts gave this provision a restricted interpretation. It was held

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statutes provided for double or treble costs in certain cases, but these provisions were all repealed by 5 & 6 Vict., c. 97, ss. 1-2.

[41] O. 65, r. 1 (Rule 976). A proviso preserved the rule permitting personal representatives and trustees to recover costs out of the estate.

[42] The inherent jurisdiction of the common law courts to regulate procedure did not extend to costs: "It is quite true that the jurisdiction of the common law courts to award costs must, in general, be found in some statute..." (*Re Sturmer and Town of Beaverton*, [1912] 2 D.L.R. 505 (Ont. Div. Court)).

[43] 53 & 54 Vict., c. 44. s. 5.

to preserve only special costs rules creating exceptions to the usual practice, not general costs legislation such as the 1696 Act.[44] The costs provisions in the *Administration of Justice Act*, 1696 were subsequently repealed.[45]

The broad discretionary power in regard to costs conferred on the English courts after 1873 has been reproduced in Saskatchewan. Rule 517 of the Saskatchewan Queen's Bench Rules is identical in substance to the costs rule adopted in England,[46] and is supported by *The Queen's Bench Act*. Section 45, Rule 12 of the Act provides that "the rules of equity shall prevail". It has been held, however, that an express costs provision in a provincial statute overrides the discretion of the court.[47]

The status of the *Administration of Justice Act*, 1696 has never been considered in the province. But even if the costs provisions in the 1696 Act and other received statutes techically remain in force, they can safely be dispensed with. Nothing in the costs provisions in the 1696 Act conflict with the way discretion is now exercised by the courts.[48] The costs rules established by the old statutes were necessary because of the rigidity of the common law rule in regard to costs. They have no constructive role to play under modern practice.

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[44] See, for example, *Rockett v. Clippingdale* (1891), 2 Q.B. 293.

[45] In part by the *Civil Procedure Repeal Act*, 1879, 42 & 43 Vict., c. 59, in part by the *Statute Law Revision Act*, 1948, 11 & 12 Geo. 6, c. 62.

[46] The rule was first adopted in the *Judicature Ordinance*, 1886. As a result, it may not require statutory support in any event.

[47] *Mildenberger v. Bill Boyd's Radio (T.V.) Clinic, Service and Sales Ltd.*, [1979] 1 W.W.R. 249 (Sask. D.C.).

(iii) Costs in Crown Suits

The *Crown Suits Act*, 1855[49] ameliorated the common law rule that the Crown neither pays nor receives costs. Despite the apparently substantive nature of this legislation, it was held not to be in force outside England by the Privy Council in *Johnson v. R.*[50] in 1904. The Privy Council decision was followed by the Saskatchewan Court of Appeal in *A.G. Sask. v. Meilicke (No. 22)*[51] in 1938. In any event, a Saskatchewan *Crown Suits (Costs) Act*[52] was adopted in 1939, perhaps in response to the Court of Appeal decision.

(iv) In forma pauperis

The *Suing in Forma Pauperis Act*, 1495[53] can perhaps be described as the first English legal aid statute. A litigant permitted to sue in

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[48] Thus a successful party will ordinarily be awarded his costs in any action even though the opposing party was successful against others. See Mark M. Orkin, *The Law of Costs*, Toronto, 1968, 27.

[49] 18 & 19 Vict., c. 90.

[50] [1904] A.C. 817.

[51] [1938] 2 W.W.R. 97.

[52] S.S. 1939, c. 20. See now R.S.S. 1978, c. C-51.

[53] 11 Hen. 7, c. 12.

forma pauperis by the Chancellor was not charged fees for the issue of writs, and the Chancellor assigned counsel to the claimant to prepare the writs. A further *Suing in Forma Pauperis Act*, 1531[54] exempted an unsuccessful needy plaintiff from liability for costs, but subjected him to "other punishment, as by the discretion of the justices or judges...shall be thought reasonable."

The 1495 statute was held to be in force in Manitoba and British Columbia.[55] Neither province had, at the time the cases arose, any local law expressly providing for suits in *forma pauperis*. This was not the situation in 1928 in Alberta, where the Rules of Court provided for suits in *forma pauperis*. This fact led the Alberta Court of Appeal to find the statutes not to be in force in *Augustine v. Canadian Northwest Railway.*[56]

Part 47 of the Rules of Court in Saskatchewan provide "needy persons" relief from costs. But, in *Storrie v. Storrie Estate*[57], Mr. Justice Gagne appears to have at least contemplated the possibility that the *Suing in Forma Pauperis Act*, 1495 remains in force in the province. The Rules of Court apply only to suits by "needy persons" resident in

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[54] 23 Hen. 8, c. 15.

[55] *Bland v. Agnew*, [1932] 3 W.W.R. 222 (B.C.C.A.); *Bland v. Agnew*, [1932] 3 W.W.R. 222 (B.C.C.A.).

[56] [1928] 1 W.W.R. 481 (Alta.C.A.).

[57] (1982), 18 Sask. L.R. 229.

Saskatchewan. The needy litigant in the case before Mr. Justice Gagne was resident in British Columbia. He noted that:

> The applicant cannot qualify as a needy person pursuant to Part 47 of the Rules of Court because she does not reside in the Province of Saskatchewan and has not applied as a poor person under the Statute Henry 7, c. 12.

Nevertheless, because legal aid programs now exist in all provinces, little scope remains for in *forma pauperis* legislation, even if the legislation does remain technically in force.

SUMMARY - STATUS OF LEGISLATION CONSIDERED

1. ACTS OR PROVISIONS OF ACTS THAT HAVE BEEN SUPERSEDED BY SIMILAR SASKATCHEWAN LEGISLATION.

   Arbitration Act, 1698

   Chancery Procedure Amendment Act, 1858, s. 3

   Court Procedure Act, 1859

2. ACTS OR PROVISIONS OF ACTS THAT HAVE BEEN SUPERSEDED IN PRACTICE, AND RELATE TO SUBJECT MATTER NOW ENCOMPASSED BY THE RULES OF COURT.

   Statute of Gloucester

   Statute of 2 Hen. 4, c. 7

   Suing in Forma Pauperis Acts, 1495 and 1571*

   Administration of Justice Act, 1696 (in part)

   Statute of 14 Geo. 2, c. 17

   Statutes of Set-Off, 1728 and 1735*

   Unification of Process Act, 1832

   Common Law Procedure Acts, 1852, 1854, 1860
   (except as noted in other chapters in this report)

   Chancery Procedure Amendment Acts, 1852 and 1858
   (except as otherwise noted)

3. ACTS OR PROVISIONS OF ACTS HELD NOT TO HAVE BEEN RECEIVED IN SASKATCHEWAN.

   Crown Suits Act, 1855

* Held to be in force by a Saskatchewan Court.

CHAPTER IX

THE PREROGATIVE WRITS

1. INTRODUCTION

The prerogative writs of habeas corpus, mandamus, certiorari and prohibition were creations of the royal prerogative and common law. Statutory regulation of the writs began almost as soon as they came into existence, and continued piecemeal until the unification of the Courts of Law and Equity in 1873. But most of the legislation affecting the writs was procedural, and rendered largely superfluous in England when Crown Practice Rules were adopted in the late 19th century. Crown Practice Rules modelled on their English counterparts regulated the remedies in Saskatchewan until 1983. The Judicial Review and Habeas Corpus Rules adopted in 1983 as part of the Rules of the Court of Queen's Bench[1] represent a significant departure. The Judicial Review Rules create a "single procedure, albeit separate remedies, in place of the complicated procedures that characterize the prerogative remedies under the old rules."[2] The habeas corpus rules similarly replace much of the old procedural framework.

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[1] Parts 51 and 53.

None of the English legislation relating to the prerogative remedies remains relevant in Saskatchewan except a single provision of the *Habeas Corpus Act*, 1816. Nevertheless, there is enough uncertainty in the reported decisions concerning the status of the received legislation to make a fairly detailed account of the legislation desirable.

2. HABEAS CORPUS

Habeas corpus is "essentially a common law right"[3], available to question the legality of any detention. Blackstone described it as "the great and efficacious writ in all manner of illegal confinement."[4] Nevertheless, it has been "confirmed and regulated by statute".[5] At least seven statutes adopted between 1640 and 1862 have affected the writ.[6] The writ is characterized as either a civil or criminal process depending upon the nature of the detention challenged.[7] Although it is most often used in practice to review committals for trial, it has been used for such civil purposes as review of committal under mental health legislation.[8]

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[2] Neva R. McKeague and Willa M.V. Voroney, *The Queen's Bench Rules of Saskatchewan: Annotated*, Saskatoon, 1985, 537.

[3] 10 Hals. (lst) 43.

[4] 3 Bl. Comm. 131.

[5] 10 Hals. (lst) 43.

[6] The count does not include the so-called suspending Acts that temporarily suspended the writ on grounds of alleged urgent political necessity.

[7] In *Re Storgoff*, [1945] S.C.R. 526.

Issue of the writ of habeas corpus is a matter involving both substantive and procedural law.[9] The procedure is now largely governed in Saskatchewan by the Rules of Court,[10] subject in criminal matters to the provisions of the *Criminal Code* relating to review of committal and detention. Insofar as English habeas corpus legislation regulates the writ as a process of the criminal law, it operates as received law within federal jurisdiction. Since several of the English Acts relate exclusively to criminal law, they are not in force as part of provincial law.[11] Much of the rest of the English legislation is purely procedural.

Consider, for example, the *Habeas Corpus Acts*, 1679 and 1816. The 1679 Act was styled "An Act for better securing the liberty of the subject", but it acheived its purpose through procedural reform. It provided for issue of the writ during judicial vacations, made issue of second and third writs known as "Alias" and "Pluries" unnecessary, and simplified procedure upon return of the writ. It applied only to criminal detentions, but the procedural reforms it contained were extended to civil detention (except imprisonment for debt and contempt) by the *Habeas Corpus Act*, 1816.[12] None of these procedural reforms have any place within the procedural system for obtaining the writ of habeas corpus under the Rules of Court.

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[8] *Fawcett v. A.G. Ont.*, [1964] S.C.R. 525. The writ was formerly granted in child custody disputes (*In Re Bergman and Waldron* (1925), 17 Sask. L.R. 497), but is apparently no longer available for that purpose (*Kempf v. Kempf*, [1945] 3 W.W.R. 615 (Sask. C.A.)).

[9] In *Re Storgoff, supra note 7.*

[10] Part 53.

[11] The *Habeas Corpus Act (1679), 31 Cha. 2, c. 2; (1842), 5 & 6 Vict., c. 38; (1802-3), 43 Geo. 3, c. 140; (1803-4), 44 Geo.3, c. 102; (1830-31) 1 Will. 4, c. 22.*

What substantive content there was in English habeas corpus legislation was often merely declaratory of the common law. "An Act for regulating of the Privy Council, and for taking away the court commonly called the Star Chamber", adopted in 1640, provided that the writ of habeas corpus would lie to question the imprisonment of any person held by command of the King or his Privy Council.[13] This was not an extension of the writ, but a confirmation of traditional liberty in a time of increasing strife between Crown and Parliament. The Act also recited the provisions of *Magna Carta* and other statutes relating to the liberty of subjects. While it may still be technically in force,[14] it is now of only historical interest.

There remains a single provision in English habeas corpus legislation that is of continuing application in Saskatchewan. At common law, the facts deposed by the jailer upon return of the writ had to be taken as true, and could only be impeached by a jury in an action for false return.[15] The rule remains in criminal matters, but was abrogated in civil cases by the *Habeas Corpus Act*, 1816.[16]

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[12] 56 Geo. 3, c. 100.

[13] 16 Cha. 1, c. 10, s. 6.

[14] Described as in force 10 Hals. (1st) 43.

3. MANDAMUS

At common law, the writ of mandamus lay to compel the performance of public duty in a broad range of cases.[17] The *Municipal Offices Act*, 1710[18] was the first of a series of statutes permitting the courts to grant "orders in the nature of mandamus" in place of the writ. The *Common Law Procedure Act*, 1854 created an action for mandamus in purely private matters.[19]

Strictly, the statutory "orders in the nature of mandamus" should be distinguished from the writ. But the distinction is essentially procedural, providing "a method of procedure more convenient than that by way of prerogative writ."[20] While some of the statutes authorizing orders in the nature of mandamus are phrased as though they created new substantive rights, the remedy was usually available in similar cases at common law. The *Justices Protection Act*, 1848, for example, authorized an order in the nature of mandamus for the purpose of compelling justices to perform their duties.[21] But as Lord Campbell noted in *R. v. Daymar*:

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[15] Robert J. Sharpe, "Habeas Corpus in Canada", 2 Dal. L.J. 241, at 265, citing "Wilmot's Opinion on the Writ of Habeas Corpus", [1758] 97 E.R. 31. See also, 10 Hals. (1st) 69.

[16] Supra note 12, ss. 3-4. The Ontario *Habeas Corpus Act*, R.S.O. 1980, c. 193 makes similar provision in civil matters. A pre-Confederation Canadian statute "An Act for more effectively securing the liberty of the subject" (1866), 29 &30 Vict., c. 45 apparently extends the rule to criminal cases. It remains in force in Ontario and Quebec.

[17] 10 Hals. (1st) 77.

[18] 9 Ann., c. 20.

[19] 17 & 18 Vict., c. 125, s. 68.

[20] 10 Hals. (1st) 104.

> The present mode of proceeding under the statute is merely a substitute for the old prerogative writ of mandamus, being a more speedy and economical remedy.[22]

Since the procedure upon applications for mandamus is now comprehensively regulated by Part 52 of the Rules of the Court of Queen's Bench, there is no longer any need to distinguish between the prerogative writ and orders in the nature of mandamus.

Similarly, the action for mandamus was characterized as a procedural matter by the Saskatchewan Court of Appeal in *McPhee v. Bock et al*[23], with the result that the provision of the *Common Law Procedure Act*, 1854 establishing it was held not to have been received. The history of the action in England after 1870 confirms that conclusion. The action was given fresh sanction by the Rules of Court adopted under the *Judicature*

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[21] 11 & 12 Vict., c. 44, s. 5.

[22] (1857), 26 L.J. (M.C.) 128.

[23] [1936] 2 W.W.R. 129 (Sask.C.A.).

Act, 1873.[24] A statutory basis for the action was deemed unnecessary thereafter, and the provision of the 1854 Act authorizing the action was repealed.[25] The English rule has been reproduced in the Saskatchewan Rules of Court.[26]

There may have been a few instances in which the scope of mandamus was extended by statute, though none are unequivocal.[27] Some writers appear to assume that the use of mandamus to challenge municipal elections rests upon the *Municipal Offices Act*, 1710.[28] But that legislation was procedural in form, merely authorizing orders in the nature of mandamus in place of the old writ. It appears that the writ lay at common law to compel elections and the filling of vacant offices in any public corporation.[29] While the legislation has been held to be in force in Canada,[30] there is little scope left for its application. The *Controverted Municipal Elections Act*[31] now regulates disputes over municipal elections in Saskatchewan. Since mandamus will likely lie in any event in any case in which the Act does not apply, there is no need to have recourse to the English legislation.

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[24] O. 53, r. 1. The rule is described at 10 Hals. (1st) 104 as "founded on the *Common Law Procedure Act*".

[25] The *Statute Law Revision Act*, 1883, 46 & 47 Vict., c. 49.

[26] Rule 395. Since the rule was first adopted in the Territorial Judicature Ordinance (Rule 479), it is presumably valid even if not strictly a matter of procedure.

[27] An exception may have been the use of mandamus in expropriation proceedings under the *Land Clauses Consolidation Act*, 1845, 8 & 9 Vict., c. 18. In *R. v. London and N.W. Rail Co.*, [1894] 2 Q.B. 512, it was stated that "mandamus lies only by virtue of s. 35 of the Act". In any event, the legislation in question is not in force in Saskatchewan (see the *Expropriation Procedure Act*, R.S.S. 1978, c. E-16).

[28] *Supra* note 18. Reference should also be made to (1724) 11 Geo. 1, c. 4, s. 2 which provided for an order in the nature of mandamus to compel the holding of a municipal election.

4. QUO WARRANTO

Quo warranto is perhaps the least used of the prerogative remedies.[32] In Saskatchewan, it may still be used to challenge the election of municipal officers where bribery and threat is alleged[33], but it is not apt to be invoked in other contexts. It is, however, available to question whether any public officer is rightfully appointed or entitled to exercise the authority he claims.[34] While it is "an antient and high prerogative remedy"[35], it has been subjected to statutory regulation to a degree out of proportion to its modern utility.

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[29] To fill a vacant canonacy: *Chichester (Bishop) v. Harward and Webber* (1787), 1 Term. Rep. 650. To compel the election of church wardens: *R. v. Wix (Inhabitants)* (1831), 2 B. & A.D., 197.

[30] *Rex ex rel. Tolfree v. Clark et al*, [1943] O.R. 501. (Ont. C.A.).

[31] S.S. 1907, c. 5, now R.S.S. 1978, c. C-32.

[32] Robert F. Reid, *Administrative Law and Practise*, Toronto, 1971, 395.

[33] The *Controverted Municipal Elections Act*, supra note 31, ss. 6-7.

[34] It has been used successfully in Canada to question the jurisdiction of a commission of inquiry (*R. ex rel McPhee v. Sargent* (1967), 64 D.L.R. (2d) 153), and to challenge appointments to a provincial municipal board (*R. ex rel Stanford v. McKoewn*, [1935] 2 D.L.R. 157).

The writ was originally available out of chancery, but medieval legislation made it available in the common law courts.[36] The procedure for obtaining the writ was complicated. By the 17th century, an "information in the nature of *quo warranto*" had been substituted for the writ.[37] The information could be filed by private individuals, leading to abuses. For that reason, the *King's Bench Act*, 1692 required leave before proceeding by way of the information.[38]

The medieval *quo warranto* statutes were repealed prior to reception date,[39] but the 1692 legislation may have become part of the law of Saskatchewan. In the *Rex ex rel. Tolfree*, the Ontario Court of Appeal held that: "That Act became law in this province, and resort must be had to it..."[40] The Act was also held to be in force in Manitoba[41], and was apparently assumed to be in force in the Territories in 1898.[42] The leave requirement was retained in the English Crown Practice Rules, and reproduced in the Saskatchewan Crown Practice Rules in force until 1983.[43] However, no leave requirement appears in the new Judicial Review Rules applicable to *quo warranto*.

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[35] Joseph Chitty, *Prerogatives of the Crown*, London, 1820, 336.

[36] The *Statute of Gloucester*, 1273, 6 Edw. 1, c. 1; *Statute of Quo Warranto*, 18 Edw. 1, stats. 1 & 2.

[37] When and how the change in procedure occurred is now a matter of conjecture. For a summary of the history of *quo warranto*, see the decision of Laidlaw J.A. in *Rex ex rel. Tolfree v. Clark*, supra note 30, and of Lord Reagan in *R. v. Speyer*, *R. v. Cassel*, [1916] 1 K.B. 595.

[38] 4 & 5 Will. & Mar., c. 18.

[39] The *Statute Law Revision Act*, 1863.

[40] *Supra*. note 30.

Because the Crown Practice Rules never had force of statute, they did not supersede received procedural law. In the result, it can be argued that the leave requirement in the 1692 statute has been unaffected by the adoption of the Judicial Review Rules. On the other hand, to the extent that the 1983 rules substitute an entirely new procedural regime for obtaining the prerogative remedies, statutory requirements operating in the context of the old system may have been rendered inapplicable.

English legislation affecting *quo warranto* after 1692 was primarily concerned with its use to regulate municipal elections. The *Municipal Offices Act*, 1710[44] provided that "it shall and may be lawful to and for proper officers...to exhibit one or more information...in the nature of *quo warranto*" where a municipal office has been usurped. A provision

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[41] *Rex ex rel. Matheson v. Huber*, [1924] 2 W.W.R. 596 (Man. K.B.).

[42] *The Queen ex rel. Thompson v. Dinnin* (1898), 3 Terr. L.R. 112.

[43] Rule 15.

[44] Supra note 18.

of the *Municipal Corporations (General) Act*, 1837[45] required the information to be obtained within 12 months of the disqualification of a municipal officer.

Provisions of the 1710 Act relating to *quo warranto* have been held to have been received in Canada.[46] Nevertheless, it is doubtful that they remains in force in Saskatchewan. The *Controverted Municipal Elections Act* specifically preserves *quo warranto* in cases of bribery and threats at elections.[47] The Saskatchewan cases in which *quo warranto* has been granted under the *Controverted Municipal Elections Act* have made no reference to English legislation.[48] The controverted elections legislation probably covers all cases in which *quo warranto* might be sought to challenge the municipal officer, but it is likely in any event that the remedy would be available in any cases not covered by the Act without recourse to English legislation. Although Mr. Justice Laidlaw was of the opinion in *Tolfree v. Clark* that the 1710 statute "was passed to enlarge the rights of a subject"[49], it appears to be purely procedural. Its full title is "An Act for rendering the proceedings upon writs of mandamus, and informations in the nature of a quo warranto more speedy and effectual; and for more easy trying and determining the rights and offices and franchises in corporations and boroughs."

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[45] 7 Will. 4 and 1 Vict., c. 78, s. 23.

[46] *Tolfree v. Clark*, supra note 30; *Re MacPherson and Deaman* (1859), 17 U.C.Q.B. 99; *Matheson v. Huber, supra* note 41.

[47] *Supra*, note 31.

[48] *Rex ex rel. Rimmer v. Hannon* (1920-21), 14 Sask. L.R. 387 (K.B.); *Harris v. Rural Municipality of Leask* (1923), 17 Sask. L.R. 415 (K.B.).

[49] *Supra* note 30.

The limitation period established in 1837 may never have been received; it has been referred to in no reported Canadian decision. Moreover, the *Controverted Municipal Elections Act* may oust any limitation period applicable to *quo warranto.* Section 18 provides that "all proceedings under this Act, other than an application in the nature of *quo warranto*...shall be commenced within four weeks after the election...." It should be noted that the Judicial Review Rules permit the courts to deny a prerogative remedy "where there has been undue delay".[50]

5. PROHIBITION AND CERTIORARI

At common law, the writs of prohibition and certiorari were issued out of the High Courts to control the actions of inferior courts in both civil and criminal matters. The writs were originally used to regulate "courts" in the narrow sense, but as tribunals and statutory bodies exercising judicial functions came into existence, the writs were extended to cover them.[51] Prohibition and certiorari are now the most frequently used prerogative remedies to control the actions of tribunals.[52] The extension of the scope of the remedies is almost entirely the work of the courts themselves, without statutory intervention.

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[50] Rule 675. Exercise of this discretion is, however, made subject to any relevant limitation period. Thus, if the 1837 legislation remains in force, twelve months remains the maximum delay permissible in an application for *quo warranto* to challenge a municipal election.

Prohibition and certiorari were regulated by statute in a few instances prior to reception date. Most of the regulatory statutes are, however, of no application to Saskatchewan at present. Certiorari in criminal matters is now regulated by the *Criminal Code*, made applicable to the prosecution of provincial offences by the *Summary Procedure Act.*[53] English statutes regulating certiorari and prohibition in civil matters were rarer, and of little modern significance. For example, the *Inferior Courts Act*, 1779[54] and the *Judgments Act*, 1837[55] permitted civil judgments to be removed to the High Court by certiorari for execution. This procedure may not have been received, and in any event is not necessary in Saskatchewan.[56] Certiorari may also have been available by statute to regulate some actions of municipal corporations in England.[57] The use of certiorari for that purpose has been superseded in any event by the remedies available under provincial municipalities legislation.[58]

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[51] *Re Trade Union Act*, 1944; *Bruton v. Regina City Policemen's Association*, [1945] 2 W.W.R. 273.

[52] Reid, *supra* note 32, at 319-320.

[53] R.S.S. 1978, c. S-63. The English statutes regulating the right in criminal matters included provisions of *The Court of Quarter Sessions Act*, (1849), 12 & 13 Vict., c. 45, s. 7 and *The Laws Continuance Act*, 1739-40, 13 Geo. 2, c. 18, s. 5. Both were re-enacted in B.C. in the *Certiorari Procedure Act*, R.S.B.C. 1911, c. 35 (R.S.B.C. 1960, c. 49, repealed S.B.C. 1976, c. 25).

[54] 19 Geo. 3, c. 70, s. 4.

[55] 1 & 2 Vict., c. 110, s. 22.

It could be argued that some of the English legislation originally adopted to regulate the writs in criminal proceedings remains in force to the extent that it can be applied by analogy to applications to review the decisions of administrative tribunals. It is at least not implausible to suggest that as the scope of certiorari was extended by the courts to tribunals other than inferior courts, the scope of legislation to regulate the remedy was also extended. While there is no express authority for this proposition, the Saskatchewan Court of Appeal in a recent decision, *Re Bassett and the Government of Canada*,[59] appears to have proceeded on the assumption that a six month limition period applicable to certiorari to challenge proceedings before a "justice or justices of the peace" remains in force, and applies to all applications for certiorari. The limitation was enacted in the Laws

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[56] In the few cases in which civil judgments are made by inferior courts, provision is made by statute for enforcement in the Court of Queen's Bench. See, for example, the *Small Claims Enforcement Act*, R.S.S. 1978, c. S-51, s. 25.

[57] The *Municipal Corporations (General) Act*, 1837, *supra* note 45.

[58] E.g. motion to quash bylaws under *The Urban Municipality Act*, 1984, S.S. 1983-84, c. U-11, s. 90.

[59] (1987), 35 D.L.R. (4th) 537.

Continuance Act, 1739-40.[60] The court did not explain the assumption, and held the limitation period to be inapplicable to the facts of the case in any event because a matter of jurisdiction was involved.[61]

The obiter assumption made by the Saskatchewan court in *Re Bassett* cannot be reconciled with authorities from other jurisdictions. The British Columbia *Certiorari Procedure Act* reproduced the relevant provision of the 1739-40 legislation.[62] In *Re Ursaki*, it was held that the Act did not apply to a certiorari application to review a decision of the Workmen's Compensation Board because the Act referred to proceedings before justices of the peace.[63]

Because the concept of jurisdictional error as a ground for certiorari is so broad,[64] there is little scope for the 1739-40 statute in applications to review decisions of administrative tribunals, even if the statute remains technically in force. It would appear to be of little practical significance in Saskatchewan.[65]

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[60] *Supra* note 53.

[61] Citing, *inter alia*, *Re Trecothic Marsh* (1905), 37 S.C.R. 79, per Tashereau, C.J.: "[a] statute taking away the writ...after six months...has no application when the judgment or proceeding of the inferior tribunal is impeached, as here, for want of jurisdiction in the tribunal".

[62] *Supra* note 53.

[63] (1960), 24 D.L.R. (2d) 761 (B.C.S.C.), citing *Queen v. Mayor of Sheffield* (1871), L.R. 6 Q.B. 652. See also *Midwest By-Products Company v. Clean Environment Commission*, [1979] 6 W.W.R. 46 (Man. Q.B.), in which s. 95 of the Manitoba *Queen's Bench Act*, probably also based on the 1739-40 statute, was held not to apply to the tribunal in question because it referred to proceedings before "magistrates, justices of the peace, and provincial judges"

[64] See *Reid*, *supra* note 32, at 358.

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[65] Note that elimination of the 1739-40 statute will not, however, clarify the status of Rule 675(2) of the Queen's Bench Rules, which provides that certiorari applications can be made more than six months after the date of the judgment [etc.] attacked only with leave. In *Re Bassett*, the discretion to grant leave was said to be *ultra vires* the rule-making power, since limitation periods are substantive rather than procedural. Thus the Rule is likely invalid whether the 1739-40 statute is in force or not. In this context, it might be noted that the 1739-40 statute was repealed in England by the *Statute Law Revision Act*, 1888, but its substance continued in the Crown Practice Rules thereafter. In the *Midwest By-Products* case, certiorari was described as a procedural step within another proceeding,and thus not subject to limitation periods in the usual sense.

SUMMARY - STATUS OF LEGISLATION CONSIDERED

1. ACTS OR PROVISIONS OF ACTS THAT ARE LIKELY IN FORCE AS PART OF PROVINCIAL LAW, AND REMAINING ESSENTIAL.

   Habeas Corpus Act, 1816, ss. 3-4

2. ACTS OR PROVISIONS OF ACTS THAT HAVE BEEN FOUND TO BE IN FORCE, OR THAT ARE LIKELY IN FORCE, BUT ARE NOW OF NO UTILITY.

   Habeas Corpus Act, 1816 (except as otherwise noted)

   An Act for Regulating the Privy Council, and for Taking Away the Court Commonly Called Star Chamber, 1640

   Laws Continuence Act, 1739-40*

   Common Law Procedure Act, 1854, s. 68**

3. ACTS OR PROVISIONS OF ACTS THAT MAY HAVE BEEN RECEIVED, BUT WHICH HAVE BEEN SUPERSEDED BY VALIDLY ADOPTED SASKATCHEWAN RULES OF COURT OR STATUTES.

   King's Bench Act, 1692*

   Municipal Offices Act, 1710

   Statute of 11 Geo. 1, c. 4, s. 2

   Inferior Courts Act, 1779, s. 4

   Municipal Corporations (General) Act, 1837, s. 23

   Judgments Act, 1837, s. 22

   Justices Protection Act, 1848, s. 5

4. ACTS OR PROVISIONS OF ACTS THAT ARE LIKELY NOT IN FORCE IN SASKATCHEWAN.

   Habeas Corpus Acts, 1679, 1842, 1802-3, 1803-4, 1830-31

* Held to be in force in Saskatchewan.

** Held not to be in force in Saskatchewan.

CHAPTER X

OTHER STATUTES

1. LIMITATION OF ACTIONS

Limitation periods are a creation of statute.[1] While actions to recover land were subject to limitations in the Middle Ages[2], the first general *Statute of Limitations* was adopted in 1623.[3] It applied to personal actions in tort and contract as well as proprietary actions. Limitation periods applicable to land were substantially reworked by the *Real Property Limitation Act*, 1833.[4] The limitation periods applicable to personal actions were affected prior to reception date only by piecemeal changes.[5]

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[1] The Doctrine of Laches developed by equity is quite distinct from limitations. The courts possess no inherent jurisdiction to bar or stay actions recognized at common law because of lapse of time - *Attorney General of Canada v. DeLaurier and Manitoba Public Insurance Corporation*, [1979] 1 W.W.R. 277 (Man. Q.B.). Further, because limitation periods are a matter of substance they cannot be modified by rules of court (*Re Bassett and Government of Canada et al* (1987), 35 D.L.R. (4th) 537 (Sask. C.A.)).

[2] The earliest limitation statutes operated by barring actions to recover land when the plaintiff had been put out of possession prior to a date or event specified in the statute, usually the beginning of a reign. The first limitation statute in modern form was 1540, 32 Hen. 8, c. 2.

[3] The *Limitation Act*, 1623, 21 Jac. 1, c. 16, amended by (1705), 4 & 5 Ann., c. 3 (c. 16 Ruff.).

[4] 1833, 3 & 4 Will. 4, c. 27, modified by the *Real Property Limitation Act*, 1837, 7 Will. 4, and 1 Vict., c. 28 and the *Law of Property Amendment Act*, 1860, 23 & 24 Vict., c. 38.

The Saskatchewan *Limitation of Actions Act* was adopted in 1932.[6] Based on the Uniform *Limitation of Actions Act* proposed by the Uniform Law Conference of Canada, it was intended to be comprehensive.[7] It expressly repealed the received English law, and marginal notes in the 1932 statute book identify the English source of most of the provisions in the Act.[8]

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[5] The *Statute of Frauds Amendment Act* (Lord Tenterden's Act), 1828 (9 Geo. 4, c. 14); the *Mercantile Law Amendment Act*, 1856 (19 & 20 Vict., c. 97); the *Civil Procedure Act*, 1833 (3 & 4 Will. 4, c. 42). Limitation statutes in force in the 19th century are listed in 19 Hals. (1st) 37, note (a).

[6] S.S. 1932, c. 18, see now R.S.S. 1978, c. L-15.

[7] Jeremy S. Williams, *Limitation of Actions in Canada* (2nd ed.), Toronto, 1980, 3-4 describes the legislation based on the Uniform Act in this manner: "The *Limitation of Actions Acts* are a complete code for the jurisdictions in which they were enacted. They are complete but are not exhaustive. In most jurisdictions, many limitation provisions may be found in other Acts."

[8] Section 45 provided that:

> The following Acts and parts of Acts are hereby repealed:
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> 31 Eliz., c. 5, (1589) *An Act respecting Informers*; 21 Jac. 1, c. 16 (1623), *An Act for Limitation of Actions and the Avoiding of Suits in Law*; 4 Ann., c. 16, s. 19, (1705), [4-S Ann. c. 3 in Stat. realm], *An Act for the Amendment of the Law and the Better Advancement of Justice*; 9 Geo. 4, c. 14, (1828), *Lord Tenterden's Act*, ss. 1 and 3; 3 & 4 Will. 4, c. 27 (1833), the *Real Property Limitation Act*; 3 & 4 Will. 4, c. 42 (1833), the *Civil Procedure Act*; 7 Will. 4 and 1 Vict., c. 28 (1837), the *Real Property Limitation Act*; 19 & 20 Vict., c. 97, (1856), the *Mercantile Law Amendment Act*, ss. 9, 11, 13 & 14; 23 & 24 Vict., c. 38, (1860), the *Law of Property Amendment Act*; and *Revised Statutes of Saskatchewan*, 1930, c. 58, the *Limitation Act*, ss. 2 & 3.

The Saskatchewan *Limitation Act* referred to in the list was adopted in 1909 (R.S.S. 1909, c. 50). The repealed sections were based on C.O.N.W.T. 1898, c. 31, ss. 1-2. The Ordinance declared the *Real Property Limitation Act*, 1874 to be in force in Saskatchewan and adopted one of the provisions of the *Mercantile Law Amendment Act*. The provision

OTHER STATUTES

"Action" is defined in the Saskatchewan *Limitation of Actions Act* to mean "any civil proceeding, including any civil proceeding by or against the Crown."[9] General limitations statutes in England did not bind the Crown until 1939.[10] Prior to that date, the general rule was provided by the maxim *nullum tempus occurrit regi*.[11] Under the *Crown Suits Act*, 1769[12], however, a 60 year limitation period was established for actions involving Crown lands. Because the *Crown Suits Act* was not included in the statutes expressly repealed by the Saskatchewan statute in 1932, there may be some doubt about its status.

The *Crown Suits Act* was held to be in force in British Columbia by the Supreme Court of Canada in *A.G. Canada v. Western Highstake Investments Ltd.*[13] in 1945. However, the British Columbia *Statute of Limitations* in force prior to 1979 was not based on the Uniform Act. It was little more than a compilation of English limitation statutes,

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left in force after 1932 related to prescription, rather than limitations in the proper sense. It was consolidated in 1940 in *The Land Titles Act*.

Section 35(4) of the 1932 Act repealed section 77 of the *Trustee Act*, R.S.S. 1930, c. 92, but re-enacted its substance. It was based on the limitation provision contained in the English *Trustee Act* of 1893.

[9] Section 2.1

[10] The *Limitation Act*, 1939, 2 & 3 Geo. 6, c. 21, s. 30(1).

[11] "No time runs against the Crown" - see *Sheffield v. Radcliffe* (1816), Hob. 334.

[12] 9 Geo. 3, c. 16, modified by the *Crown Suits Act*, 1861, 24 & 25 Vict., c. 62. The 1769 Act is commonly referred to as the *Nullum Tempus Act*.

[13] [1945] S.C.R. 385.

and did not bind the Crown.[14] It is unlikely that the *Crown Suits Act* survived the enactment of *The Limitation of Actions Act* in Saskatchewan in 1932.[15]

2. CORPORATION LAW

Modern English corporations law dates from Gladstone's *Joint Stock Company Act*, 1844,[16] and subsequent enactments consolidated in the

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[14] See R.S.B.C. 1960, c. 370. Marginal notes identify the English statutes from which the British Columbia Act was composed.

[15] It should also be noted that adverse possession of Crown lands was the subject matter of 21 Jac. 1, c. 14, which provided that the Crown cannot grant land upon which a subject has been in adverse possession for more than 20 years without re-investing itself with possession. Although the statute was held to be in force in Nova Scotia (*Scott v. Henderson* (1843), 3 N.S.R. 115), it is likely obsolete, and certainly unnecessary under modern limitations schemes. Since s. 18 of *The Limitation of Actions Act* establishes a 10 year limitation period presumably binding the Crown, the Crown is no longer in any different position in respect of an adverse possession than any other land owner.

[16] 7 & 8 Vict., cc. 110 and 111. Joint stock companies created without formal authorization flourished until the *Bubble Act*, (1720) 6 Geo. 1, c. 18, a response to the intense speculation in the shares of the South Sea Company; the South Sea "Bubble" burst in that year. The Act made any company not created by Royal Charter or Act of Parliament "illegal and void." The great monopolistic corporations created by Royal Charter, such as the Hudson's Bay Company, were not affected by the Act. Unincorporated joint stock companies became popular in the 19th century, however, and the *Bubble Act* was repealed (1825), 6 Geo. 4, c. 91. No mode of incorporation except charter or private act existed until 1844. On the history of English company law, see L.C.B. Gower, *The Principles of Modern Company Law* (3d), London, 1969, chpt. 2.

The *Statute of Monopolies*, 1623, 21 Jac. 1, c. 3 imposed another impediment on the formation of companies. It rendered void all Crown grants of monopolies in trade and manufacturing for a period of more than 14 years without the approval of Parliament. However, it did not apply to the creation of chartered companies engaged in overseas trade (such as the Hudson's Bay Company): *East India Co. v. Sandys* (1684), skin. 132. Although it is possible that the statute remains in force to control the creation of monopolies within the province, and was re-enacted in Ontario (R.S.O. 1897, c. 323), its subject matter is now largely encompassed by combines investigation, trademark and patent law.

OTHER STATUTES

Companies Acts, 1862 and 1867.[17]

Prior to the adoption of general incorporation statutes in Canada, it was common practice to incorporate by Private Act of the Legislature, or under English law.[18] It is doubtful, however, that English company law was received anywhere in Canada. Incorporation in England was convenient, and perhaps prestigious,[19] but did not depend upon reception of English statute law for its efficacy. The common law permitted extraterrritorial operation of corporations:

> The comity of nations distinctly recognizes the right of foreign incorporated companies to carry on business and make contracts outside the country in which they are incorporated, if consistent with the purposes of the corporation, and not prohibited by Charter, and not inconsistent with the local laws....[20]

The registry system established by the 1844 legislation in England did not, of course, exist in British North America. Local legislatures established their own incorporation legislation as soon as local conditions warranted.[21]

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[17] (1862), 25 & 26 Vict., c. 89; (1867), 30 &31 Vict., c. 118. See also the *Companies Clauses Act*, 1863, 26 & 27 Vict., c. 118.

[18] F.E. Labrie and E.E. Palmer, "The Pre-Confederation History of Corporations in Canada", in J.S. Ziegel (ed.), *Studies in Canadian Company Law*, Toronto, 1967, 33.

[19] *Ibid.*, at 43.

[20] *Canadian Pacific Railway v. Western Union Telegraph Co. Ltd.* (1889), 27 S.C.R. 151. The *Bubble Act*, however, was in force in Upper Canada, and appears to have placed a fetter on foreign companies not complying with it. See *Bank of Montreal v. Bethune (1835)*, 4 U.C.Q.B. 341. The status of the *Bubble Act* is the exception that proves the rule - it appears to have been the consensus of the opinion that the *Bubble Act*, as originally enacted, did not extend to the colonies. At the bequest of London merchants in 1741, the legislation was amended to extend to "His Majesty's dominions, colonies and plantations in America" (14 Geo. 2, c. 37). See Labrie and Palmer, *supra* note 18, at 37.

Until 1901, companies operating in the Territories were usually incorporated in Ontario or under Dominion companies legislation, and carried on business without local registration.[22] In that year, a Company's Ordinance[23] was adopted, and in 1903 a further ordinance required registration of "foreign companies".[24] Both ordinances were continued as Saskatchewan statutes.[25] There can be no doubt that the legislation superseded any English corporation statutes that may have been received as part of the local law.

3. FAMILY LAW

(i) The Divorce and Matrimonial Causes Act

In 1870, virtually the only English statute dealing with the traditional core of family law was the *Divorce and Matrimonial Causes*

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[21] Legislation facilitating incorporation of savings banks was adopted in lower Canada in 1832. The first general *Incorporation Act* was enacted in the province of Canada in 1850 (13 & 14 Vict., c. 28); it was based on the English Act of 1844 and American models, and became in turn the model for other Canadian "registration" systems of incorporation. See *Ibid.*, at 57-60.

[22] See *Ontario Wind Engine and Pump Company v. Eldred* (1912), 2 W.W.R. 60 (Sask. S.C.).

[23] O.N.W.T. 1901, c. 20.

[24] O.N.W.T., 1903, c. 14.

[25] The *Companies Act*, R.S.S. 1909, c. 72; The *Foreign Companies Act*, R.S.S. 1909, c. 73.

Act, 1857.[26] Prior to the adoption of that Act, divorce and separation was the exclusive preserve of ecclesiastical law. A divorce could be obtained only by a private act of Parliament;[27] otherwise legislators did not dare to intervene until the authority of the established church had been thoroughly undermined in other areas. The 1857 Act created a new divorce court to take jurisdiction from the ecclesiastical courts, with jurisdiction to grant divorces as well as the remedies formerly available in the ecclesiastical courts.

Reception of the 1857 Act in the Northwest Territories was firmly established by the local courts by 1900,[28] and confirmed by the Privy Council in 1919.[29] It was printed as an appendix to the Revised Statutes of Saskatchewan in 1920, and has been reprinted in each revision since. However, because jurisdiction under the *Divorce and Matrimonial Causes Act* was vested in a divorce court, the Privy Council decision held that only the substantive content of the Act was received. Matters of practice and procedure were left to the local superior courts.[30]

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[26] 20 & 21 Vict., c. 85. Amendments (21 & 22 Vict., c. 108; 22 & 23 Vict., c. 61; 23 & 24 Vict., c. 144; 29 & 30 Vict., c. 32; 31 & 32 Vict., c. 77) dealt primarily with matters of procedure.

[27] H.R. Hahlo, "Reform of the Divorce Act, 1968 (Canada)", in Law Reform Commission of Canada, *Studies on Divorce*, 10.

[28] *Hardie v. Hardie* (1900), 7 Terr. L.R. 13 (S.C.). There was some initial doubt that the statute had been received, primarily because jurisdiction under the Act was conferred on a "divorce court" with no analogue in the Territories. However, resistance may also have come from the fact that many of the territorial judges and barristers came from Ontario, where the 1857 Act had not been received - see Brian Thompson, "The Law of Divorce in Saskatchewan and other Western Provinces" (1917), 37 C.L.T. 687.

[29] *Board v. Board*, [1919] 2 W.W.R. 940.

Even though it was received, it is doubtful that any part of the 1857 Act remains in force. The grounds for divorce established by the Act remained part of the law of Saskatchewan until the federal *Divorce Act* was adopted in 1968. The 1857 Act took jurisdiction to annul marriages away from the ecclesiastical courts, but left the grounds for annulment unchanged. The jurisdiction of Saskatchewan courts to grant a decree of nullity rests on their inherent jurisdiction, rather than upon the *Divorce and Matrimonial Causes Act.*[31] The rest of the 1857 legislation related to matters apparently within provincial jurisdiction, but local legislation began to erode the status of the Act at an early date.

Apart from divorce, the principal remedies provided by the *Divorce and Matrimonial Causes Act* were decrees of judicial separation and orders for restitution of conjugal rights.[32] Once either form of relief had been granted, the Act also permitted the court to grant alimony to a wife.[33] A Territorial Ordinance preserved the English law, but made alimony available without obtaining a judicial separation or restitution of conjugal rights in any case in which the grounds for granting those remedies were present.[34] In the 1949 the *King's Bench Act* expressly authorized judgments of judicial separation and restitution of conjugal rights, and set out the grounds upon which they could be granted.[35] From that date, the received law relating to judicial separation, restitution of conjugal rights, and alimony was wholly superseded.[36]

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[30] See above, p. 43.

[31] Any doubt about the jurisdiction of the Court of Queen's Bench in this regard is resolved by the combined effect of section 12 of *The Queen's Bench Act*, R.S.S. 1978, c. Q-1 and section 8 of the *Divorce and Matrimonial Causes Act.* Section 8 appointed senior judges of the Court of Queen's Bench, the Court of Common Pleas, the Court of Exchequer, and the Court of Probate as the judges of the Divorce Court. *The Queen's Bench Act* gives the Court of Queen's Bench

> ...the jurisdiction that in England, prior to the passing of the *Supreme Court of Judicature Act*, 1873, was vested in, or capable of being exercised by, all or one or more of the judges of the courts above mentioned [Chancery, Queen's Bench, Common Pleas, Exchequer and Probate] sitting in court or chambers or elsewhere when acting as judge pursuant of any statute, law or custom....

The jurisdiction to annul a marriage may be rooted in *The Queen's Bench Act*, which in turn depends upon the jurisdiction of English judges prior to 1873. In any event, the jurisdiction does not depend upon reception of the *Divorce and Matrimonial Causes Act.*

Section 33 of the *Divorce and Matrimonial Causes Act* permitted husbands to claim damages from the co-respondent when adultery could be proved. The new action replaced the common law action for criminal conversation, though the distinction between the two actions appears to have been largely procedural.[37] Section 33 was held in force in Saskatchewan in 1910.[38] For reasons which are now obscure, *The King's Bench Act* was amended in 1915 to restore the action for criminal conversation as it was "prior to the abolition of such action in England".[39] Whether the legislation affected the status of the *Divorce and Matrimonial Causes Act* provision was unclear. In 1978, however, both criminal conversation and any other right to damages "in consequence of adultery" were abolished in Saskatchewan.[40]

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[32] Sections 16-17.

[33] Section 32.

[34] C.O.N.W.T. 1898, c. 29, s. 1. Consolidated in the *Judicature Act*, R.S.S. 1907, c. 52, s. 23.

[35] S.S. 1949, c. 24. See now, *The Queen's Bench Act*, ss. 24-28.

[36] Section 25 of the *Divorce and Matrimonial Causes Act* provided that upon judicial separation, a wife was to be considered a *feme sole* with respect to property she acquired. Section 26 extended that status for purposes of contracts and suing and being sued. These provisions became redundant after the concept of the separate property of a married woman was established by the *Married Women's Property Acts*. The *Married Women's Property Acts* also superseded the *Married Women's Reversionary Interest Act*, 1857, 20 & 21 Vict., c. 57. The first *Married Women's Property Act* was adopted in England just after reception date (33 & 34 Vict., c. 93), but the Saskatchewan *Married Women's Property Act*, S.S. 1907, c. 18 was based on the English *Married Women's Property Act* of 1893.

(ii) Custody and Maintenance of Children

The *Divorce and Matrimonial Causes Act* permitted the court to make "such provision...as it may deem just and proper with respect to the custody, maintenance, and education of the children of the marriage" in divorce, nullity and judicial separation proceedings.[41] The provision was essentially procedural, apparently continuing the practice of the ecclesiastical courts.

At common law, a father was guardian of the person of his children under the age of discretion, usually taken to be 14 for males, but set by statute as early as 1557 at 16 for females.[42] Guardianship of the heir apparent apparently extended to the age of majority, but that species of guardianship may have lapsed after the abolition of primogeniture in 1833.[43] Guardianship of the land of heirs after the death of the father under feudal law lapsed when the ancient tenures were abolished by the *Tenures Abolition Act*, 1660[44], but the Act gave fathers the right to nominate testamentary guardians by will.

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[37] See the comments on the relationship between the actions in *Anderson v. Anderson* (1970), 75 W.W.R. 179 (B.C.C.A).

[38] *Marson v. Coulter*, [1910] 3 Sask. L.R. 157.

[39] S.S. 1915, c. 10, s. 22.

[40] S.S. 1977-78, c. 31, s. 2. See now, *The Queen's Bench Act*, s. 40.

[41] Section 35.

The modern law of custody and guardianship does not derive from the common law or the miscellaneous statutes referred to above, but from equity. Equity intervened at an early date to protect the property rights of children by appointing guardians, and by the 19th century would, in appropriate cases, even displace a father while he still lived.[45] The *Custody of Infants Act*, 1873[46] and the more comprehensive *Guardianship of Infants Act*, 1886[47] extended the equitable jurisdiction and placed it on a statutory foundation. The Saskatchewan *Infants Act*, adopted in 1919, was based largely on the English legislation of 1886, but also included authorization of parental appointment of testamentary guardians on terms similar to those in the *Tenures Abolition Act*, 1660.[48]

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[42] (1557), 4 & 5 Ph. & M., c. 8.

[43] The *Inheritance Act*, 3 & 4 Will. 4, c. 106.

[44] 12 Cha. 2, c. 24. See above, pp. 62-63. See *De Prerogativa Regis* (1324), 17 Edw. II, Stat. 1, c. 1-18 (Ruff. listed as of uncertain date in the Statutes of the Realm), confirmed some of the incidents of tenure, including marriage, primer seisin and wardship of the heirs of tenants in Knight's service (repealed in part, *Statute Law Revision Act*, 1863). Guardianship of the heir of tenants in socage belonged to the next-of-kin, rather than the feudal lord. By 52 Hen. 3, c. 17 (*Statute of Marlbridge*), guardians in socage were compelled to give an accounting, and preserve the property of the ward. Although the latter provision was re-enacted, R.S.B.C. 1911, c. 107, guardianship in socage is now obsolete, having been superseded by appointment of property guardians under the *Infant's Act*.

In addition to the jurisdiction of the ecclesiastical court to grant maintenance for children, an obligation on parents to maintain their children up to the age of discretion was recognized by the poor laws. The *Poor Relief Act*, 1601[49] made parents and grandparents of every poor person liable for their maintenance. The *Poor Law Amendment Act*, 1834[50] extended the obligation to illegitimate children. The poor laws were essentially social welfare legislation. Although held in force by the British Columbia Supreme Court in 1941,[51] the Court of Appeal reacned a contrary decision in 1970.[52] The machinery of the poor laws was described by the court as a local English institution to deal with relief of the poor. The provisions of the legislation imposing maintenance obligations on parents were merely incidental to that purpose.

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[45] *Eyre v. Staftsbury* (1725), 2 P. Wms. 102, 25 E.R. 121; *Re A.B.*, an Infant (1825), 1 Glr. 657.

[46] 36 & 37 Vict., c. 12.

[47] 49 & 50 Vict., c. 77. There were some pre-reception predecessors to the 1873 and 1886 legislation. 2 & 3 Vict., c. 54, building on the equitable jurisdiction, gave access rights to mothers, and permitted to court to "committ" children under the age of 7 to their mothers. It was presumably received, but was superseded by an amendment to the Saskatchewan *Infant's Act*, S.S. 1919-20, c. 77, s. 3, giving mothers and fathers equal rights to custody of their children. 3 & 4 Vict., c. 90 permitted the court to assign the care of children who committed felonies to persons other than their guardians. It is essentially a precursor of *The Family Services Act*, R.S.S. 1978, c. F-7).

[48] S.S. 1918-19, c. 82. On the relationship between the Saskatchewan legislation and the English law it superseded, see *In Re Sherwin Estate*; *In Re Langley Estate*, [1927] 2 W.W.R. 609. The development of the law of custody and guardianship has been more comprehensively discussed by the Commission in its reports *Proposals on Custody, Parental Guardianship and the Civil Rights of Minors* (1981), and *Tentative Proposals Relating to Testamentary Custody and Guardianship of Children* (1984).

[49] 43 Eliz. 1, c. 2.

There is no Saskatchewan authority on the status of the poor laws. The general purpose of the legislation is achieved by the Saskatchewan *Assistance Act.*[53] *The Deserted Spouses and Children's Maintenance Act*[54] and *The Children of Unmarried Parents Act*[55] impose obligations on parents to maintain their children.

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[50] 4 & 5 Will. 4, c. 76.

[51] *R. v. Hall*, [1941] 2 W.W.R. 245 (B.C.S.C.), followed as recently as 1967 in *Jaeger v. Jaeger* (1967), 60 W.W.R. 417 (B.C. Fam. Ct.).

[52] *McKenzie v. McKenzie* (1970), 73 W.W.R. 206 (B.C.C.A.).

[53] R.S.S. 1978, c. S-8.

[54] R.S.S. 1978, c. D-26.

[55] R.S.S. 1978, c. C-7.

(iii) Marriage

The status of English marriage legislation adopted prior to 1870 has been considered in several reported decisions in western Canada. While some of the legislation may remain in force as part of the law within federal jurisdiction, it would appear that all English marriage legislation within provincial jurisdiction was either not received, or has been superseded by local legislation.

The *Marriage Act*, 1823[56] required marriages to be celebrated *in facie ecclesiae* (in the face of the church). It repealed *Lord Hardwicke's Act* of 1753, which was of similar effect. The 1753 Act was held to be in force in part in Upper Canada and Ontario in the 19th century.[57] The 1823 Act, despite its similarity, was held not to have been received in western Canada.[58] In any event, the provincial *Marriage Act*, originally adopted as a Territorial Ordinance, now establishes the formalities necessary for a valid marriage.[59]

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[56] 4 Geo. 4, c. 76.

[57] *R. v. Roblin* (1862), 21 U.C.Q.B. 355; *Lawless v. Chamberlain* (1890), 18 O.R. 296.

[58] *Connolly v. Woolrich* (1867), 11 L.C. Jur. 197; *The Queen v. Nan-e-quis-a-ka* (1889), 1 Terr. L.R. 211 (N.W.T.S.C.).

[59] C.O.N.W.T. 1898, c. 46. See now R.S.S. 1978, c. M-4.

OTHER STATUTES

The *Marriage Act*, 1835, also known as *Lord Lyndhurst's Act*[60] made marriages within the prohibited degrees of consanguinity and affinity void *ab initio* rather than merely void by a sentence of the ecclesiastical court. The legislation has been held to be in force in British Columbia,[61] Alberta,[62] and Manitoba.[63] It is likely that the legislation is in force in Saskatchewan, but since it relates to a matter of substance rather than form in the celebration of marriages, it is in force as legislation within the federal "marriage and divorce" jurisdiction.[64]

The *Marriage of Lunatics Acts*, 1742 and 1811[65] were held not to be in force in Canada in *Meanwell v. Meanwell*[66] in 1941. However, the court in that case apparently confused received law with statutes in force *proprio vigore*. At common law, a marriage was invalid if either party to the marriage was insane at the time of marriage. In practice, the courts have applied the common law rule in most cases without reference to the statutes.[67]

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[60] 5 & 6 Will. 4, c. 54.

[61] *Crickmay v. Crickmay* (1957), 58 W.W.R. 577 (B.C.C.A.).

[62] In *Re Seidler and Mackie*, [1929] 2 W.W.R. 645 (S.C.).

[63] *Dejardin v. Dejardin*, [1932] 2 W.W.R. 237 (Man. K.B.).

[64] The *Constitution Act*, 1867, s. 91(26). Although the province cannot specify those degrees of relationship which render a marriage void, the *Marriage Act* does require an applicant for a marriage licence to complete a statutory declaration that he or she is not about to marry within the prohibited degrees of consanguinity and affinity. The tables set out on the back of the declaration, and prescribed by the marriage regulations, closely approximate the tables set out in the Church of England's *Book of Common Prayer*, as modified by the federal *Marriage Act*, R.S.C. 1970, c. M-5 (which abolished one of the prohibited degrees but did not otherwise purport to disturb the received law). However, degrees of consanguinity were established by statute (28 Hen. 8, c. 7, 32 Hen. 8, c. 38, 1 Eliz. 1, c. 1), and differ somewhat from the list in the Prayer Book. The status of these statutes in England is uncertain. See *R. v. Dibidin* (1909), 79 L.J.K.B. 517 (C.A.). But whether the list of prohibited degrees in the marriage regulations conforms with the substantive law or not, it is federal rather than provincial substantive law that is at issue.

[65] (1742), 15 Geo. 2, c. 30; (1811), 51 Geo. 3, c. 37.

The Saskatchewan *Marriage Act*[68] formerly provided that "no person who...is a mentally retarded person as defined in the regulations or...is a mentally ill person as defined in the regulations...shall marry within the province." If that provision was valid provincial law, it superseded both the English statutes and the common law. It is more likely, however, that the effect of mental incapacity at the time of marriage is a matter within federal jurisdiction.[69] In any event, the *Marriage of Lunatics Acts* are not now in force as law within provincial jurisdiction.

4. BARRISTERS AND SOLICITORS

Most English legislation regulating the professions can be characterized as law of local application. Any part of it that was received has been largely superseded by provincial legislation. Thus, for example, the *Physicians and Surgeons Act*, 1542[70] has been held not to be in force in British Columbia.[71]

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[66] (1941), 1 W.W.R. 154 (Man. C.A.).

[67] See, for example, *Bell v. Bell*, [1946] 1 W.W.R. 215 (Sask. C.A.).

[68] *Supra* note 59.

[69] See H.R. Hahlo, "Nullity of Marriage", in G. Mendes da Costa, *Studies in Canadian Family Law*, Toronto, 1972, 651, at 666.

However, the legal profession would appear to be an exception. Although an *Ordinance Respecting the Legal Profession* was adopted in 1885[72], and replaced by *The Legal Professions Act* in 1907,[73] one provision of English barristers and solicitors legislation has been held to be in force in Saskatchewan, and another is at least a candidate for that status.

(i) Solicitor's Liens

The Saskatchewan *Legal Professions Act* was modelled on the English *Solicitors Acts* of 1843[74] and 1860.[75] It is likely that the provincial legislation was intended to be a complete statutory code regulating the profession, but it did not include any provision analogous to section

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[70] 34 & 35 Hen. 8, c. 8.

[71] *R. v. DeBanou* (1968), 67 W.W.R. 54 (B.C.C.A.).

[72] O.N.W.T. 1885, c. 10. The Ordinance designated as qualified to practice law persons residing in the Territory who have been trained in the law in any of "Her Majesty's Dominions". A more comprehensive ordinance, C.O.N.W.T. 1898, c. 51 incorporated the Law Society. For the early history of the legal profession in Saskatchewan, see W.H. McConnell, *Prairie Justice*, Calgary, 1980, chpt. 2.

[73] R.S.S. 1909, c. 104.

[74] 6 & 7 Vict., c. 73.

[75] 23 & 24 Vict., c. 127.

28 of the 1860 Act.

The 1860 legislation created a statutory lien for fees on property recovered or preserved through a solicitor's efforts. The common law recognized a similar lien,[76] but the statutory lien differed in several respects. First, it extended to real as well as personal property. Second, it was enforceable by way of a charging order made on application of the solicitor. Third, the statutory lien could only be defeated by transfer to a *bona fide* purchaser for value.[77]

Section 28 of the 1860 Act was held to be in force by the Saskatchewan Court of Appeal in 1930 in *Bloomaert v. Dunlop*.[78] Since that case involved a lien on money paid into court by the defendant, the common law lien would have been sufficient; most subsequent decisions concerning solicitors' liens have been content to rely upon the common law.[79] Nevertheless, because the scope of the statutory lien is broader than the common law lien, it remains a potentially significant part of the law of Saskatchewan.

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[76] In addition, common law also recognized a solicitor's lien with respect to deeds, papers and files.

[77] The common law lien appears to be more easily defeated. See, however, *Fife v. McLaren* (1913), 5 W.W.R. 653. On the distinction between the common law and statutory liens generally, see 36 Hals. (3d) 173.

[78] [1930] 1 W.W.R. 270 (Sask. C.A.). Cited with approval in *Wellman v. Gerome* (1967), 63 D.L.R. (2d) 530 (Sask. Q.B.).

[79] *Bearss v. Trowell and Blahut* (1980), 16 Sask. R. 288; *Rees, Newsham and Weir v. Stanek*, [1981] 5 W.W.R. 614.

(ii) Contingency Fees and Contracts for Fees

The *Solicitors Act*, 1870[80] was entirely concerned with solicitors' fees. Prior to the Act, there was doubt that a solicitor could contract for remuneration on any scale other than that determined by tariff and custom. An Ontario case described the law in that province prior to legislation modelled on the English Act in these terms:

> Before...the *Law Reform Act*, 1909, it was incompetent for a solicitor to make a bargain with his client for remunerations upon any other or higher scale than that allowed by law. Charges made by solicitors for services rendered by them were subject to review by the court; and any attempt to obtain more than the law permitted was sternly dealt with.[81]

Even before 1870, however, some latitude was afforded to lawyers in assessing fees where the fees were charged in accordance with a clear contract.[82]

The 1870 Act permitted solicitors to contract for remuneration "either by gross sum, or by commission or percentage, or by salary or otherwise...."[83] It stopped short, however, of permitting contingency fees. Section 11 provided that:

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[80] 33 & 34 Vict. c. 28, assented to July 14, 1870.

[81] In *Re Solicitor*, [1911-12] 3 O.W.N. 1274.

[82] *Thomas v. Cross*, 13 W.R. 166 in which a mortgage taken by a solicitor from his client for payment of costs was held to be enforceable.

[83] Section 4.

> Nothing in this Act contained shall be construed to give validity to any purchase by an attorney or solicitor of the interest, or any part of the interest, of its client in any suit, action or other contingent proceeding to be brought or maintained, or to give validity to any agreement by which an attorney or solicitor retained or employed to prosecute any suit or action, stipulates for payment only in the event of success in such suit, action or proceeding.

The 1870 Act was held to be in force in the Yukon in 1900 in *Robertson v. Bossuyt.*[84] The legal professions legislation in force in the Yukon at that time was similar to the Saskatchewan *Legal Professions Act*. Because the decision in *Robertson v. Bossuyt* was rendered by the British Columbia courts, it was regarded as applicable in that province as well. For that reason, the British Columbia *Legal Professions Act* was amended in 1901 to permit contracts for payments of fees "in lieu of or in addition to costs which were allowed to the said solicitor or barrister." Unlike the 1870 legislation, however, the British Columbia legislation expressly permitted contingency fees.[85]

The British Columbia legislation was not initially well received by the courts. In 1927, it was held *ultra vires* to the extent that it permitted contingency fees, since contingency fees amounted to champerty, an offence under the criminal law.[86] It was not until *Amacher v. Erickson* in 1963 that British Columbia courts were willing to hold that a contingency fee is not necessarily champertous.[87]

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[84] (1900), 8 B.C.R. 301.

[85] See now, the *Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26. The inspiration for the 1901 legislation in British Columbia was traced to the English Act in *Usipuik v. Jensen*, [1986] 5 W.W.R. 41.

The law in Saskatchewan relating to contracts for fees is not entirely unambiguous. Although the Court of Appeal held in *Speers v. Hagemeister*[88] both that a solicitor and client may contract themselves out of the tariff, and that a contingency fee is not necessarily champertous, the court did not consider the status of the *Solicitors Act*, 1870.

There is considerable authority in Saskatchewan for the proposition that a solicitor and client may contract themselves out of the tariff. In *Speers v. Hagemeister*, Mr. Justice Hall relied upon a 1911 decision, *Allan v. Dangerfield*[89] that in turn relied upon English authority antedating the *Solicitors Act*, 1870.[90] Although the guidance in this regard provided by the 1870 Act would be useful, it does not appear to be a necessary underpinning for the established practice in Saskatchewan.

The prohibition on contingency fees contained in the 1870 Act is more troublesome. Since *Speers v. Hagemeister* did not consider the 1870 legislation, it is difficult to conclude that contingency fees are beyond reproach in Saskatchewan, even though they now appear to be an established part of legal practice in the province. Legislative clarification would be desirable.

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[86] *Re Legal Professions Act*, [1927] 2 W.W.R. 808. See above, pp. 170-174.

[87] (1963), 42 W.W.R. 348.

[88] (1974), 52 D.L.R. (3d) 201, (Sask. C.A.).

[89] (1911) 18 W.L.R. 58.

[90] See above, note 80.

5. CONSTITUTIONAL STATUTES

The rise of individual freedom, and the restraint on royal power that provided the foundation for democracy, were conditioned by the legislation of reforming Parliaments. Much of the legislation in this category has been superseded by *The Charter of Rights and Freedoms* and federal and provincial legislation protecting human rights. Nevertheless, it is appropriate to retain such landmarks in the evolution of the English constitution as *Magna Carta* and the *Bill of Rights* as part of Saskatchewan law to the extent that they are relevant to matters within provincial jurisdiction.

Other legislation that can be described as "constitutional" may be of more practical significance. The *Act of Settlement*, 1700, for example, determined the descent of the Crown, and may still be necessary as part of provincial law to give formal recognition to the British monarch as the Crown in the right of Saskatchewan.[91]

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[91] The notion of the divisibility of the Crown is not unambiguous. Although a distinction between the Crown in the right of the United Kingdom, Canada, and the provinces has been recognized for some purposes, it is uncertain that it would even now permit a province (or Dominion) to legislate separately from the United Kingdom in regard

OTHER STATUTES

Some of the statutes in the first category were consolidated in Ontario in "An Act respecting certain rights and liberties of the people"[92], and many of the statutes in both categories have more recently been identified under the heading "Constitutional Legislation" in the Schedule of Imperial Acts in force in New Zealand appended to the Imperial Laws Application Bill.[93] There are, however, some statutes in addition to those identified by the Ontario and New Zealand legislation that should be regarded as part of the law of Saskatchewan.

A brief discussion of "constitutional statutes" of some continuing historical interest is included here, without analysis of the overlap between federal and provincial jurisdiction that undoubtedly exists in some cases, and without much attention to the extent that the statutes considered may have been superceded in practise.

Magna Carta, 1297, 25 Edw. 1, c. 29: This was the last promulgation of the Great Charter; it differed in some respects from the Charter granted

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to descent of the Crown. See Peter W. Hogg, *Constitutional Law of Canada* (2nd ed.), Toronto, 1985, 216.

The notion of divisibility does appear to have received legislative recognition in a similar context: the demise of the Crown. Although the *Demise of the Crown Act*, 1901, 1 Edw. 7, c. 5 was in force *proprio vigore*, local legislation validating the holding of offices of the Crown and acts done by public officials after the death of the monarch has been enacted: *The Demise of the Crown Act*, R.S.S. 1978, c. D-3.

[92] R.S.O. 1897, c. 322. Reprinted in the Appendix to succeeding consolidations.

[93] Introduced in the Parliament of New Zealand, 21 October 1986. See the New Zealand Law Reform Commission, *Imperial Legislation in Force in New Zealand*, Report No. 1, 1987.

by King John at Runneymede in 1215.[94] The 1297 Charter occupies chapters 1-37 of the statute book for that year. The *Statute Law Reform Act* of 1863 repealed parts of the Charter before reception date,[95] and more of it was repealed in England in 1879,[96] 1887, and 1892. Of the remaining chapters, all but c. 29 dealt with matters of little modern relevance (c. 7 - dower; c. 8, 18 - Crown debt; c. 9, 15, 16, 23, 25, 30 - courts, bridges, rivers and merchants; c. 10 - distress; c. 14, 22, 29 - criminal law.) Chapter 29, re-enacted in Ontario and retained in New Zealand,[97] provides that:

> No free man shall be taken or imprisoned, or be disseized of his freehold, or be outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor [condemn him] but by lawful judgment of his peers, or by the law of the land. We will sell no man, we will not deny or defer to any man either justice or right.

The Statutes of 5 Edw. 3, c. 9; 25 Edw. 3, stat. 5, c. 4; 28 Edw. 3, c. 3; 42 Edw. 3, c. 3: These statutes confirmed the principle that "none shall be condemned without due process of law". They were themselves confirmed by the Act abolishing the Star Chamber (16 Cha. 1, c. 10). All are contained in either the Ontario legislation or the New Zealand schedule.

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[94] See Maitland, *The Constitutional History of England*, Cambridge, 1916, at 16.

[95] Chapters 1-6, 13, 19-21, 24-28, 31, 33-34, 36-37.

[96] Chapters 11, 12, 17 and 32.

[97] See also *Meisner v. Fanning*, 3 N.S.R. 97 and *In re Immigration Act and Munshi Singh* (1914), 6 W.W.R. 1347 (B.C.C.A.), holding *Magna Carta* to be in force.

The Statute of Marlbridge, 52 Hen. 3, c. 1: This statute, contained in the Ontario legislation, provided that "...all persons, as well of high as of low estate, shall receive justice in the King's court".

The Petition of Right, 1627, 3 Cha. 1, c. 1: The petition was a catalogue of grievances of Parliament against Charles I. Its historical significance lies in its affirmation of traditional liberties. The first section, for example, recites that "the King's subjects should not be taxed but by consent of Parliament", and attributes the principle to statutes of the reigns of Edward I and Edward III. The petition is contained in the New Zealand schedule.

The Bill of Rights, 1688, 1 Will. & Mar., sess. 2, c. 2: Like the *Petition of Right*, the *Bill of Rights* was styled as "for the vindicating and asserting of their auntient rights and liberties". It is contained in the New Zealand schedule.

The *Toleration Act*, 1689, 1 Will. & Mar., c. 18: "An Act for exempting their Majesties' Protestant subjects, dissenting from the Church of England from penalties of certain laws." Although the laws named in the statute were statutes that should not in any event be retained as part of the law of Saskatchewan (assuming even that they were received),[98] the *Toleration Act* was an important landmark in the extension of religious freedom. It is useful to retain it as an expression of the concept of toleration.

The *Roman Catholic Emancipation Act*, 1829, 10 Geo. 4, c. 7: "An Act for the relief for Her Majesty's Roman Catholic subjects...." Another important landmark in the extension of religious freedom.

An Act Abolishing Slavery, 1833, 3 & 4 Will. 4, c. 73: The Act provides that "slavery shall be and is hereby utterly and forever abolished and declared unlawful throughout the British colonies, plantations and possessions abroad...." The Act is undoubtedly in force *proprio vigore.*

The *Act of Settlement*, 1700, 12 & 13 Will. 3, c. 2: The *Act of Settlement* determined the descent of the Crown, and prescribed the form of oath to be administered on the coronation of a monarch. As the New Zealand Law Reform Commission proposed "...the law relating to the Coronation Oath [should] not be made different from the law of the United Kingdom on that matter."

The *Royal Marriages Act*, 1772, 12 Geo. 3, c. 11: The Act requires

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[98] A provision of the *Toleration Act* making "malicious or contemptuous" disturbance of a church an offence was, however, held to be in force in *Reid v. Inglis et al* (1862), 12 U.C.C.P. 191. This provision has been superseded by s. 172 of the *Criminal Code*, which makes it an offence to disturb an assembly of people for religious worship, moral, social, or benevolent purpose.

"consent of His Majesty" to the marriage of a member of the royal family "into foreign families". See the note on the *Act of Settlement.*

The *Accession Declaration Act*, 1910, 10 Edw. 7 and 1 Geo. 5, c. 29: This Act amended the form of the coronation oath. It is presumably in force *proprio vigore.* See the note to the *Act of Settlement.*

6. OTHER

(i) The Calendar

The Gregorian calendar was adopted in England in 1750, almost two centuries after Pope Gregory reformed the calendar in Catholic Europe. Obviously, a change in the way dates were reckoned required the kind of authoritative sanction that could only be conveniently provided by an Act of Parliament. The *Calendar (New Style) Act*, 1750[99] declared the Gregorian system to be in effect in England, and suppressed the 11 days which would have been September 3, 1752 to September 14 of that year. It also contained provisions requiring the observance of certain days, some transitional provisions to preserve legal rights arising during the suppressed days and tables to aid in the calculation of the date of Easter. The Act was made expressly applicable to all colonies and possessions of the Crown. It presumably remains in force in Saskatchewan *proprio vigore*, as amended prior to the *Statute of*

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[99] 24 Geo. 2, c. 23.

Westminster in 1931.[100]

Because establishment of a standard calendar is a matter of national importance, it may be that the *Calendar Act* should be regarded as an Imperial statute within federal jurisdiction. But even if the legislation is within provincial jurisdiction, it is not likely to have much practicial significance. Calendars and time-keeping are essentially matters of custom, regulated only incidentally by statute law. Most of the nations which accepted the Gregorian calendar in 1582 in response to the Papal Bull establishing the new system did not regard local legislation as necessary. The English *Calendar Act* was adopted more to effect a change in custom than to provide a legal basis for the calendar. After more than two centuries, it is hardly necessary to retain an obscure English statute to prevent calendar makers from falling into error.

(ii) Conflict of Laws

The *Dominions Laws Ascertainment Act*, 1859[101] permitted a judge in one jurisdiction within the British empire to refer the facts in dispute before him to a judge in a second imperial jurisdiction as an aid in ascertaining how the laws of the second jurisdiction would apply to the case. The *Foreign Laws Ascertainment Act*, 1861[102] extended the principle in the 1859 Act to foreign countries that entered into an appropriate convention for that purpose. Both Acts expressly applied to all "Her Majesty's Dominions", and remain in force *proprio vigore* in Saskatchewan.

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[100] The provisions in the Act requiring the observance of certain days were repealed in 1859 by 22 Vict., c. 2, s. 1. The tables for the calculation of the date of Easter were repealed and replaced by a new aid to calculation by the *Easter Act*, 1928, 18 & 19 Geo. 5, c. 35. The *Easter Act* is presumably in force *proprio vigore*.

[101] 22 & 23 Vict., c. 63.

The policy of the 1859 and 1861 Acts is attractive. At common law, when a court is required to apply the law of another jurisdiction, it is entitled to take judicial notice of the foreign law.[103] Because neither the court nor legal counsel appearing before it are apt to be experts in the law of other jurisdictions, a reference mechanism like that created by the *Dominions and Foreign Laws Ascertainment Acts* is an improvement over the common law.[104] In practice, however, the 1859 and 1861 legislation appear to be dead letters in Canada.

The *Dominions Laws Ascertainment Act* was applied in 1877 in *Stuart v. Baldwin*[105] by an Ontario Court in order to ascertain the law of Quebec. There is no evidence that it has been used in Canada since that date.[106] In Saskatchewan, the practice has been to receive opinion evidence from experts on foreign law, or for the court to examine the foreign law itself, taking judicial notice of its findings.[107] The 1861 Act never appears to have been effective. No convention has been entered into with any foreign country to give effect to the Act.[108] Both statutes have been ignored by Canadian writers on conflict of laws.[109]

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[102] 24 Vict., c. 11.

[103] See J.G. Castel, *Proof of Foreign Law* (1972), 22 U of T L.J., 33.

[104] See J. McLeod, *The Conflict of Laws*, Calgary, 1983, 41.

[105] (1877), 41 U.C.Q.B. 446.

(iii) The Truck Act

The *Truck Act*, 1831[110] was the precursor of modern labour standards legislation.[111] At common law, wages due from an employer to an employee

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[106] Express mention of the 1859 and 1861 Acts is made in a note to section 32 of the *Manitoba Evidence Act*, R.S.M. 1970, c. E-150. Sections 31 and 32 of the Act, however, codify the common law rule permitting courts to take judicial notice of foreign law.

[107] *Bondholders Securities Corporation v. Manville et al*, [1935] 1 W.W.R. 452 (Sask. C.A.).

[108] *Halsbury's Statutes of England* (3d), vol. 12, 1969, 834.

[109] Castel's journal article on the proof of foreign law mentions neither statute. McLeod's textbook on the conflict of laws alludes to the 1861 Act in a single footnote.

[110] 1 & 2 Will. 4, c. 37.

[111] There was very little other "labour legislation" prior to reception date. The notorious *Combination Acts* (1799), 39 Geo. 3, c. 81, and 1800, 39 & 40 Geo. 3, c. 106, which reinforced the common law principle that trade unions were illegal restraints on trade, were repealed in 1824 (5 Geo. 4, c. 96), but the first legislation giving legal status to unions in England was not adopted until after reception date (*The Trade Union Act*, 1871, 34 & 35 Vict., c. 31).

Apprenticeship legislation, on the other hand, had a long history in England - dating back at least to a statute of 5 Eliz. 1, c. 4. Some English apprenticeship legislation was re-enacted in British Columbia (R.S.B.C. 1911, c. 107, re-enacting 20 Geo. 2, c. 19), but it may never have been in force as received law (see *Shea v. Choat* (1845), 2 U.C.Q.B. 211, holding 56 Geo. 3, c. 139 not in force). In any event, any apprenticeship legislation that had the same status as ordinary debt. If the employer alleged that the employee owed him money, he could set off the debt against the wages owing. Although an employee had the right to dispute the alleged liability through court proceedings, an employee who protested too loudly might find himself out of a job. Section 3 of the *Truck Act* provided that:

> The entire amount of wages earned by or payable to any artificer...shall be actually paid to such artificer in the current coin of this realm....

But section 23 of the Act specifically authorized deductions for the cost of medicine or medical attendances, fuel, materials and tools from wages.

In 1913, Saskatchewan adopted *An Act respecting the Payment of Wages to Certain Employees.*[112] The legislation, like the *Truck Act*, prohibited deductions from wages, but did not establish any exceptions. In 1941, the Act was amended to allow deductions for medical care supplied by an employer.[113] The *Employees' Wage Act*, 1961[114] provided more comprehensive regulation of working conditions and payment of wages. However, it replaced the stipulation prohibiting deductions from wages with a vague

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may have been received has been superseded; see *The Apprenticeship and Tradesmen's Qualification Act*, R.S.S. 1978, c. A-23.

[112] S.S. 1913, c. 40. The 1913 statute had no short title, but it was included in R.S.S. 1920 as the *Workmen's Wage Act* (c. 187).

[113] S.S. 1941, c. 83, s. 1.

[114] S.S. 1961, c. 62, s. 1. See now *The Labour Standards Act*, R.S.S. 1978, c. L-1.

formula:

> 8.(1) All wages shall be paid in Canadian currency or by cheque drawn upon a chartered bank or a credit union....
>
> 16. Nothing in this Act prohibits the employer from making deductions from the wages of an employee that may lawfully be deducted.

It is difficult to escape the conclusion that the *Truck Act*, 1831 was impliedly repealed when Saskatchewan adopted similar legislation in 1913. Since that time, any prohibition on deduction of debts owing from wages must find its statutory foundation in Saskatchewan enactments. No clear prohibition has been contained in Saskatchewan law since 1961, when the provincial legislation was amended to permit lawful deductions from wages. The Department of Labour interprets the legislation as permitting deductions such as unemployment insurance, pension plan contributions, and income tax (which are expressly authorized by law), but not debts owing to the employer. In effect, the policy established by the *Truck Act*, 1831 has been retained in practice.

(iv) Expropriation: Injurious Affection

Expropriation and compensation are matters of statute[115]. In England, expropriation for local public works was authorized by legislation

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[115] See 6 Hals. *Laws of England* (1st), p. 5ff., and *Rockingham Sisters of Charity v. R.* [1922] 3 W.W.R. 35 (P.C.)

"classed as local and personal acts on the statute book."[116] More general expropriation legislation typically empowered specific departments of government[117] or authorities to acquire land.[118] Because expropriation statutes were tied to local public works and local institutions, there can be little doubt that such legislation was not received as part of the law of Saskatchewan. Although the question has not been fully considered in any reported decision, Canadian courts appear to have uniformly proceeded on the assumption that expropriation and compensation must be authorized by a Canadian statute.[119]

General legislation governing expropriation procedures was adopted in England in the *Land Clauses Consolidation Act*, 1845.[120] It is unlikely that this legislation, despite its broad scope, was received. As originally enacted, the 1845 *Act* applied only to expropriation for "undertakings...authorized by special *Acts*".[121] Assuming that the

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[116] See 6 Hals. *Laws of England* (1st) p. 8.

[117] E.g. *The Coastguard Service Act*, 1856, 19 & 20 Vict. c. 83, authorizing the admiralty to expropriate land for certain purposes.

[118] E.g. *The Sewers Act*, 1833, 3 & 4 Will. IV, c. 22, which conferred expropriation powers on "commissioners of sewers".

[119] *Rockingham Sisters of Charity v. R.* Supra note 1, at p. 35.

[120] 8 & 9 Vict., c. 18.

[121] S.S. 1, 5 and 152. The *Act* was amended to extend its scope to expropriation by municipal corporations (45-6 Vict., c. 50), and to expropriations by the admiralty and war department, 23-4 Vict., c. 106.

"special *Acts*" to which the expropriation procedures established by the *Land Clauses Consolidation Act* applied were not themselves received, it is unlikely that the *Land Clauses Consolidation Act* itself was received. Saskatchewan had no analog to the 1845 *Act* until *The Expropriation Procedure Act* was adopted in 1968.[122] This *Act* is similar in structure to the 1845 English legislation. Therefore, even if the 1845 legislation was received, it was likely superceded by the 1968 legislation.

There would be no reason to further discuss expropriation legislation in the present context were it not for a peculiarity of the *Land Clauses Consolidation Act* that has led Canadian courts to have frequent recourse to it for the purpose of construing Canadian expropriation legislation. Although the 1845 *Act* is technically not in force anywhere in Canada, some of the principles it embodies seem to have been translated into Canadian law regardless of the precise wording of Canadian expropriation legislation.

The *Land Clauses Consolidation Act*, 1845 created a right to claim compensation when, as the result of the construction of a public work, an adjacent property lost value. Both the right to compensation in such circumstances, and the term "injurious affection" to describe it, originated in the 1845 legislation.[123] Section 63 of the *Land Clauses Consolidation Act* provided that:

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[122] S.S. 1968, c. 21 - See now, R.S.S., 1978, c. E-16.

> In estimating the purchase money or compensation to be paid...regard shall be had...not only to the value of the land...but also to the damage (if any) to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers....

It will be noted that, on its face, this provision appears to apply only in a case where part of the land of the person seeking compensation has been taken. Section 68 of the *Act*, however, further provided that: "If any party is entitled to any compensation in respect of any land or interest therein which has been taken for or injuriously affected by the execution of works..." a procedure is available to determine compensation payable. Although this section does not appear to create any substantive right, but merely to authorize determination of compensation payable under section 63, the courts at an early date were prepared to interpret it as authority to make compensation for injurious affection even when none of the lands of the claimant had been expropriated.[124]

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[123] See Law Reform Commission of British Columbia, Report on Expropriation, 1971, at p. 156. Some earlier special *Acts* authorizing expropriation appear, however, to have made provision for compensation in similar circumstances (6 Hals. *Laws of England* (1st) 11).

[124] See *Rockingham Sisters of Charity v. R.* Supra 1, and the cases referred to therein.

This perhaps unusual interpretation of the provisions of the 1845 *Act* was imported by Canadian courts when Canadian expropriation legislation was considered.[125] In fact, the English principles have been so loosely applied that damages for injurious affection have been awarded even when the expropriation statute in question did not contain any language expressly providing for compensation for injurious affection.[126]

Saskatchewan expropriation legislation has adopted several different formulae. *The Expropriation Act*[127], which applies to expropriations under *The Water Powers Act* and *The Conservation and Development Act*, provides for "[T]he payment of compensation therefor and for damages to land arising out of the construction or maintenance of works and undertakings...". This formula is probably wide enough to make damages for injurious affection available whether part of the claimant's lands have been expropriated or not. *The City Act*[128] formerly provided that:

> The Council shall make to the owners of land taken by the City in exercise of any of the powers conferred by this *Act* due compensation therefore, and shall pay damages for any land injuriously affected by such exercise.

It is perhaps not completely clear that this provision would apply to an injurious affection where none of the claimant's land has been expropriated, but the courts held that damages were available in such a case.[129] Surprisingly, the expropriation powers in *The City Act* were replaced by an even vaguer formula in *The Municipal Expropriation Act.*[130] Section 9 of the *Act* provides that "in estimating the amount to which the claimant is entitled", consideration shall be given to "the damage, if any, to the remaining land of the claimant." On its face, this provision would appear to apply only to cases in which there has been a partial taking of the claimant's lands. However, section 10 provides that:

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[125] Ibid, at 35.

[126] See the discussion of compensation under various nineteenth century ***Railways Acts*** in *Holditch v. C.N.O.Ry.*, [1916] 1 A.C. 536 (P.C.).

[127] R.S.S. 1978, c. E-15.

[128] R.S.S. 1940, c. 126, S. 431 (1).

> the Council may tender to a person making compensation such amount as it considers proper compensation for the land taken or injuriously affected.

In effect, the new legislation reverts to something closer to the English formula of 1845 than to the formula contained in the old *City Act*. If the approach taken to the English *Act* is applied to *The Municipal Expropriation Act* it would follow that damages for injurious affection are available even when there has been no partial taking.

The state of the law under the expropriation provisions contained in *The Highways Act*[131] is somewhat more equivocal. Section 56 (1) provides that "in estimating the amount to which the claimant is entitled", the arbitrator shall "consider and find separately" as to both the value of the land taken and "the damage, if any, to the remaining property" of the claimant. The only reported cases in which claims as for "injurious affection" have been considered involve circumstances in which a partial taking has occurred.[132] Nevertheless, if the broad principles established in the English jurisprudence under the 1845 legislation and its Canadian analogs are applied, it might be held that a claim for injurious affection could be made even when there is no partial taking. Against the background provided by these authorities, the fact that the provision expressly provides for separate findings as to the value of land and other damage to property might be regarded as significant.

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[129] *Vachon v. Prince Albert* (1916) 10 W.W.R. 359.

[130] S.S. 1946, C. 45. See now R.S.S. 1978, c. N-27.

[131] R.S.S. 1978, c. H-3.

A few Saskatchewan expropriation statutes make no provision at all for injurious affection, even in the case of a partial taking of the claimant's lands. For example, *The Expropriation (Rehabilitation Projects) Act*[133] merely provides that "due compensation" shall be made for "land taken pursuant to the foregoing sections". In such cases, the general provisions of *The Expropriation Procedure Act* now apply. In an action for compensation under *The Expropriation Procedure Act*, the court is to consider "damage caused by the severance of the expropriated land from the other land", thus providing for damages for injurious affection at least in cases of partial takings.

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[132] E.g. *Peifer v. Saskatchewan* (1984) 33 Sask. R. 131.

[133] R.S.S. 1978, c. E-17.

It is unfortunate that *The Expropriation Procedure Act*, which was intended to provide a uniform approach to compensation when expropriation occurs, did not more directly address the question of injurious affection. In the result, a variety of compensation formulae continue to apply. Although there can be little doubt that the *English Land Clauses Consolidation Act*, 1845, is not in force, recourse may be had to that legislation in order to construe the various formulae.

(v) The Life Assurance Act, 1774

The *Life Assurance Act*, 1774[134] provided statutory foundation for the principle that an insurance contract in which the insured has no insurable interest in the subject matter of the policy is void. The Act applied not only to life insurance, but to any policy of insurance except insurance on ships, goods and merchandise.

The Act was held not to be in force in Saskatchewan by Mr. Justice Martin in *Crown Bakery Ltd. v. Preferred Accident Insurance Co.*[135] Judge Martin was of the opinion that:

> A perusal of the *Saskatchewan Insurance Act*, as it was enacted in 1915 and again in 1924-25, convinces me that the Legislature intended to cover the entire field of insurance, and to enact a complete code of law to govern all insurance contracts in the province; the entire

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[134] 14 Geo. 3, c. 48.

[135] [1933] 2 W.W.R. 33 (Sask. C.A.).

> subject matter has been so dealt with as to force the conclusion of the *Imperial Life Assurance Act* of 1774, if it was in force here as part of the law of England on July 15, 1870, has been impliedly repealed.

Section 140 of the Saskatchewan *Insurance Act*[136] provides that a life insurance policy is void "where at the time a contract would otherwise take effect, the insured has no insurable interest". The provisions in the Act relating to other forms of insurance do not expressly prohibit insurance contracts in which the insured has no insurable interest, but places limits on the scope of insurance coverage with much the same effect in practice. For example, statutory condition 2 in Part IV of the Act, "fire insurance", provides that "unless otherwise specifically stated in the contract, the insurer is not liable for loss or damage to property owned by any person other than the insured, unless the interest of the insured person is stated in the contract." Public liability and automobile insurance is classified in the Act in 2 categories - "owners' policies", which insure a vehicle owned by the insured, and "non-owners' policies" that provide insurance for the insured while driving a vehicle other than his own. Section 194 of the Act, relating to "owners' policies" expressly provides that:

> Where the contract evidenced by a owner's policy also provides insurance against liability in respect of an automobile not owned by the insured named in the contract, an insurer may stipulate in the contract that the insurance is restricted to such persons as are specified in the contract.

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[136] R.S.S. 1978, c. S-26.

In sum, the Saskatchewan *Insurance Act* effectively replaces the *Life Assurance Act*, 1774.

(vi) Replevin Bonds

A replevin action permits a person claiming to be entitled to goods to obtain immediate possession "in lieu of first having to bring an action of conversion, detinue or trespass".[137] Under Rule 408 of the Saskatchewan Queen's Bench Rules, when the sheriff replevies goods, the plaintiff must give a performance bond twice the value of the goods to indemnify the defendant if the plaintiff does not successfully prove his claim to the goods in the subsequent action. The practise of requiring the bond is at least as old as the 17th century, and was regulated by section 8 of the *Administration of Justice Act*, 1696.[138]

The 1696 enactment confirmed the defendant's right to damages and costs in appropriate cases,[139] but limited the amount recoverable under the bond to actual damages, not the amount of the bond itself. That provision was held to be in force in Saskatchewan in 1967 in *Bennett v.*

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[137] Crossley Vains, *Personal Property* (3rd), London, 1962, 398.

[138] 8 & 9 Will. 3, c. 11.

[139] It apparently superseded earlier legislation in that regard: in *Petrie v. Rideout*, [1925] S.C.R. 347, the Statutes of 7 Hen. 8, c. 4, s. 3, 21 Hen. 8, c. 19, s. 3, and 17 Car. 2, c. 7 are identified.

Lofgren.[140]

(vii) Mental Incompetence

The Saskatchewan *Mentally Disordered Persons Act*[141] was substantially based on the English Lunacy Act, 1890.[142] The *Lunacy Act* largely superseded earlier legislation relating to guardianship of mentally incompetent persons. It did not, however, repeal the provisions of *De Prerogativa Regis* (1324)[143] relating to "lunatics". That statute vested care and custody of the estates of "lunatics" in the King, and was probably declaratory of the common law. In practice, the royal authority was exercised by the Chancellor by warrant under the sign manual.[144] Nineteenth century legislation permitted other judges of the Court of Chancery to exercise "jurisdiction in lunacy".[145] Halsbury reported that "The jurisdiction of the Lord Chancellor is not usually exercised at the present time [that is, after 1890]",[146] but it appears to have survived the adoption of the *Lunacy Act*.

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[140] (1967), 61 W.W.R. 622 (Sask.Q.B.).

[141] R.S.S. 1978, c. M-14, originally enacted as *The Lunacy Act*, 1919, S.S. 1918-19, c. 58.

[142] 53 & 54 Vict., c. 31.

[143] *Supra* note 44.

[144] The form is this warrant is set out in Campbell, *Lives of the Chancellors*, v. 1, p. 14.

[145] The *Lunacy Regulation Act*, 1853, 16 & 17 Vict., c. 70; *The Court of Chancery (Officers) Act*, 1867, 30 & 31 Vict., c. 87.

The territorial *Judicature Ordinance* of 1886[147] conferred on the Supreme Court the jurisdiction "in the case of lunatics" exercised by "a commission from the Crown under the sign manual". This provision was retained in the *Judicature Act*, 1907,[148] and remains part of the *Queen's Bench Act*.[149] But it has been superfluous since adoption of provincial mental incompetency legislation in 1919,[150] which replaced the ancient jurisdiction derived from *De Prerogativa Regis* with a new statutory regime for declarations of incompetence and appointment of committees for mentally disabled persons.

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[146] 9 Hals. (1st) 95.

[147] O.N.W.T., 1886, No. 2, s. 339.

[148] S.S. 1907, c. 8, s. 23.

[149] R.S.S. 1978, c. Q-1, s. 20.

[150] See the informal report of the Law Reform Commission of Saskatchewan, *The Queen's Bench Act - Section 20*, August, 1986.

(viii) Interpretation of Statutes

The Saskatchewan *Interpretation Act*[151] defines "Act" or "statute" to mean "An Act or Statute of the Legislature of Saskatchewan and includes an Ordinance of the Northwest Territories in force in this province."[152] Although an English statute ordinarily has the same status in law as a local enactment, the express language of the *Interpretation Act* may preclude application of it to received law. However, the Saskatchewan *Interpretation Act* is similar in content to Lord Brougham's *Interpretation Act* of 1850.[153] *Lord Brougham's Act* may remain in force in the province as an aid to the interpretation of received English statutes.

Consider, for example, the effect of section 23 of the Saskatchewan *Interpretation Act* which is analogous to section 5 of *Lord Brougham's Act*. The legislation provides that:

> Where an Act or amendment is repealed in whole or in part....the repeal...does not...revive any Act [or]...affect the previous operation of any Act [or]...affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the Act...so repealed.

At common law, if a statute was repealed, but the repealing statute itself subsequently repealed, the original statute revived. In *Re Bremner*, it was suggested by counsel that an English statute had been revived by repeal of provincial legislation affecting it, there being no provincial *Interpretation Act* in force at the time of the repeal. The Manitoba Court of Appeal concluded, however, that *Lord Brougham's Act* had been received and applied it to the case.[154] It is probably safe to assume the Act to remain in force so long as other English statutes that may require interpretation remain part of provincial law.

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[151] R.S.S. 1978, c. I-11.

[152] Section 21(1)l.

[153] 13 & 14 Vict., c. 21.

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[154] (1889), 6 Man. L.R. 73 (per Taylor C.J.).

SUMMARY - STATUS OF LEGISLATION CONSIDERED

1. ACTS OR PROVISIONS OF ACTS THAT MAY HAVE BEEN RECEIVED, BUT WHICH HAVE BEEN REPEALED OR SUPERSEDED BY SASKATCHEWAN LEGISLATION.

Statutes of Marlbridge, 1267, c. 17

An Act Respecting Informers, 1589*

Statute of 21 Jac. 1, c. 14

Limitation of Actions Act, 1623*

Tenures Abolition Act, 1660**

An Act for the Amendment of the Law and to the Better Advancement of Justice, 1705*

Crown Suits Act, 1769

Life Assurance Act, 1774**

Marriage Act, 1823**

Truck Act, 1831

Real Property Limitation Acts, 1833 and 1856*

Solicitors Act, 1843

Divorce and Matrimonial Causes Act, 1857***

Law of Property Amendment Act, 1860*

Solicitors Act, 1860 (except as otherwise noted)

Demise of the Crown Act, 1901

2. ACTS OR PROVISIONS OF ACTS THAT HAVE BEEN HELD NOT TO HAVE BEEN RECEIVED, OR WHICH LIKELY WERE NOT RECEIVED AS PART OF THE LAW WITHIN PROVINCIAL JURISDICTION.

Physicians and Surgeons Act, 1542

Poor Relief Act, 1601

Statutes of Monopolies, 1623

OTHER STATUTES

Marriage of Lunatics Acts, 1742 and 1811****

Poor Law Amendment Act, 1834

Marriage Act, 1835****

Joint Stock Company Act, 1844

Companies Acts, 1862 and 1867

Companies Clauses Act, 1867

Solicitors Act, 1870

Land Clauses Consolidation Act, 1845

3. ACTS OR PROVISIONS OF ACTS THAT WERE LIKELY RECEIVED, BUT WHICH RETAIN NO UTILITY.

De prerogativia regis, 1324

Statute of 4 and 5 Ph. and M., c. 8

Calendar Act, 1750

Dominion Laws Ascertainment Acts, 1859 and 1861

Easter Act, 1928

4. ACTS OR PROVISIONS OF ACTS WHICH WILL LIKELY REMAIN IN FORCE, AND REMAIN ESSENTIAL.

Administration of Justice Act, 1696***

Interpretation Act, 1850

Solicitors Act, 1860, s. 28***

5. ACTS OR PROVISIONS OF ACTS OF CONSTITUTIONAL SIGNIFICANCE OR HISTORIC INTEREST.

Magna Carta, 1297, c. 29

Statutes of 5 Edw. 3, c. 9; 25 Edw. 3, stat. 5, c. 4;
28 Edw. 3, c. 3; 42 Edw. 3, c. 3

Statute of Marlbridge, c. 1

Petition of Rights, 1627

Bill of Rights, 1688

Toleration Act, 1689

Act of Settlement, 1700

Royal Marriages Act, 1772

Roman Catholic Emancipation Act, 1829

Act Abolishing Slavery, 1833

Accession Declaration Act, 1910

* Repealed by Saskatchewan legislation
** Held not in force in Saskatchewan
*** Held in force in Saskatchewan
**** In force as part of Federal law

APPENDIX

DISPOSING OF ENGLISH STATUTE LAW: PROPOSALS

The Introduction suggested that "those English statutes that remain a useful part of Saskatchewan law should be reaffirmed as part of our law; other English statutes should be declared to be no longer in force."[1] Such a project for law reform is more easily stated than implemented. Inevitably, there will be a margin of error in any attempt to dispose of received statute law. But even a brief review of the "summaries of the statutes considered" appended to the chapters in Part II will suggest that a manageable list of living statutes can be identified that will remove any real likelihood of serious problems in the future.

This appendix makes proposals identifying those statutes that should be retained as part of the law of the province and the manner in which they should be re-incorporated into provincial law. Those statutes that are identified in the text as having continuing relevance are collected, together with suggestions for the appropriate mode of re-enactment. The list is not a comprehensive collection of statutes that have been found to be, or that may be, in force; it deliberately omits statutes that are no longer of utility, even if a technical argument for reception might be made.

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[1] Supra, p. 8.

THE STATUS OF ENGLISH STATUTE LAW

In broad terms, two categories of English statutes that should be retained can be identified:

1. Statutes that have been found to be in force in Saskatchewan, or in other jurisdictions in which the reception issue is similar, and which are still of practical application. Statutes such as the *Statute of Frauds*[2], *The Partition Act*[3], and *The Fraudulent Conveyances Act*[4] are obvious candidates for inclusion in this category. *The Sale of Land by Auction Act*[5], and section 86 of *The Fires Prevention Act*[6] are perhaps less obvious, but are also examples of statutes that have been found to be in force and have a practical role to play.

2. Statutes that have not been directly referred to in any reported decision, but which are in force by necessary implication. For example, *The Administration of Estates Act*, 1798[7] established the rule that an infant executor cannot obtain letters probate. Surrogate Court rule 21(1)(d) would appear to rest on that statutory foundation. For that reason, it should be retained in some form. Also included in this catagory are statutes which provide part of the basic foundation of our

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[2] Supra, pp. 151-154.

[3] Supra, pp. 74-77.

[4] Supra, pp. 146-151.

[5] Supra, pp. 80-81.

[6] Supra, pp. 163-164.

[7] Supra, pp. 109-112.

legal system. Statutes in that category establish principles so taken for granted that their origin is obscured. For example, *The Statute of Quia Emptores*, 1290[8] established the types of legal interests in real property that can be created by conveyance. It is almost certainly in force, and should remain in force, but there has been no need to refer to it in any reported decision in Saskatchewan.

Once the statutes to be retained have been identified, it is necessary to determine the manner in which they are to be reincorporated into our law.

Re-enactment of useful received law will require more than merely transcribing English statutes. Consider, for example, the *Statute of Frauds*, 1677.[9] It should be consolidated with its amendments, and provisions in it that are no longer useful (or which have been repealed by implication) should be weeded out. Of the 25 sections in that *Act*, only ten were concerned with the subject matter usually associated with the *Statute of Frauds*. One of those has been superseded by a provision of *The Saskatchewan Sale of Goods Act*, but not expressly repealed. Of the 15 provisions that do not deal with frauds in the usual sense, some were repealed before reception date in England, and none of the others appear to be of any utility at present. In addition, certain provisions of the *Statute of Frauds Amendment Act*, 1828 apparently remain in force in Saskatchewan.

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[8] Supra, pp. 55-56.

[9] Supra, note 2.

Many of the older statutes should also be modernized in language, particularly if, like the *Statute of Frauds* or *The Fraudulent Conveyances Act*, they are enactments that will continue to be consulted as a matter of routine by lawyers in the province. The task of modernization can be simplified in many cases, however, by considering re-enactments that have been undertaken elsewhere. Several provinces have adopted modern language versions of the *Statute of Frauds*, for example.

There are many miscellaneous provisions of English enactments that deserve to be reaffirmed as part of Saskatchewan law. Some of these can be re-enacted as part of existing Saskatchewan legislation. For example, all of the scattered provisions relating to the law of landlord and tenant that were identified as useful in Chapter 2, Part II could be re-enacted without much change in form in the Saskatchewan *Landlord and Tenant Act*. In a few cases, however, there would appear to be no convenient place in existing provincial legislation to re-enact the English provision. Such provisions might be included in an omnibus "English Statutes Re-enactment Act", or re-enacted in a series of statutes. For example, some of the miscellaneous real property provisions referred to in Chapter 1, Part II could be re-enacted in a "Real Property (Miscellaneous Provisions) Act."

STATUTES WHICH SHOULD BE RE-ENACTED

Statute of Marlbridge, 1267, c. 23.

This chapter of the *Statute of Marlbridge* established the principle that a leaseholder is liable for waste unless the terms of the lease provide otherwise. A similar provision is contained in *The Land Titles Act* (s. 120), but applies only to leases subject to that *Act*. That the implied covenants set out in s. 120 of *The Land Titles Act* do not apply generally to all leases is probably an historical accident. The *Statute of Marlbridge* would be most conveniently disposed of by repealing s. 120 of *The Land Titles Act*, and re-enacting it as a provision of *The Landlord and Tenant Act*. [See pp. 91-93]

Quia emptores terrarum, 1290.

This is a "foundation statute" that must be retained as part of real property law for technical reasons. The operative portion of the statute has been re-enacted in Ontario, R.S.O. 1897, chapter 330, s. 2 (R.S.S. 1980, Appendix A). The language has been modernized, and reduced to a single section. A similar version of the statute could be re-enacted in Saskatchewan in an omnibus "English Statutes Re-enactment Act" or a "Real Property (Miscellaneous Provisions) Act". [See pp. 55-56]

***Intestate Estates Administration Act*, 1357.**

See *The Probate Fees Act*, 1529.

***Probate Fees Act*, 1529, ss. 3-4.**

This *Act*, and the *Intestate Estates Administration Act*, 1357 established certain priorities in regard to the right to administer an estate. Rules 28 and 36 of the Rules of the Surrogate Court similarly set out lists of priorities. The rules, however, must rest on the substantive authority provided by the statutes. Technically, the rules are not the appropriate place to set out the priorities. Therefore, the most satisfactory way to dispose of the English statutes would be to re-enact the substance of the rules in *The Surrogate Court Act*. [See pp. 121-123]

***Statute of Uses*, 1535.**

This is a "foundation statute" that should be retained as part of real property law for technical reasons. It was re-enacted with modernized spelling in Ontario, R.S.O. 1897, c. 331 (R.S.O. 1980, Appendix A). The Ontario version of the *Act* is eight sections long. Several sections of it would appear to be unnecessary. Sections 5, 6, and 7 deal with dower. Section 4 appears to have been superseded by later landlord and tenant law, and section 8 appears to have expired. Oosterhoff, *Cases* *and Materials on the Law of Trusts* (Second Edition, 1983), provides an abridgement of the statute "stripped to its bare essentials" that would retain all that is necessary of this statute. A section based on Oosterhoff's abridgement could be re-enacted in an omnibus "English Statutes Re-enactment Act", or a "Real Property (Miscellaneous Provisions) Act". [See pp. 56-62]

***Statutes of Partition*, 1539 and 1540.**

See *Partition Act*, 1868.

***Fraudulent Conveyances Act*, 1570.**

This *Act* (except s. 3 which creates a criminal sanction) is in force in Saskatchewan, and is an important part of Saskatchewan law. It should be re-enacted as a Saskatchewan statute. Several provinces have re-enacted the *Fraudulent Conveyances Act*, and modernized the language. See for example, R.S.O. 1980, c. 176. [See pp. 146-151]

Charities Act, 1601, preamble.

The preamble to The *Charities Act* provides the definition of charity when it is necessary to determine whether a charitable purpose has been established by a trust or bequest. This provision could be re-enacted in an "English Statutes Re-enactment Act" or as a provision of the provincial *Trustee Act*. [See pp. 132-133]

***The Statute of 43 Eliz. 1*, c. 8, 1601.**

This statute provided that when a grant of probate has been "wrongfully or fraudulently" made, the person who received the grant is chargeable as an executor *de son tort*. In a modern context, the provision is useful in cases where an erroneous grant has been made. The Saskatchewan *Surrogate Court Act* contains no provision relating to erroneous grants. Rather than re-enact the Elizabethan statute, however, it would probably be desirable to enact a provision relating to erroneous grants similar to s. 17 of the Ontario *Surrogate Court Act* (R.S.O. 1980, c. 512). [See pp. 119-120]

***Statute of Frauds*, 1677, ss. 1-4, 7-9; *Statute of Frauds Amendment Act*, 1828, ss. 5 and 6.**

This statute should be re-enacted as a Saskatchewan statute. The Ontario *Statute of Frauds* (R.S.O. 1980, c. 481) consolidates the 1828 and 1677 Acts, and modernizes the language to some extent. It could serve as a model for Saskatchewan legislation, but some changes would be necessary--the Ontario legislation makes reference to the *Conveyancing and Law of Property Act* of Ontario, which would be inappropriate in Saskatchewan legislation. Some consideration should be given to adapting the language of *The Statute of Frauds* to the Land Titles System. [See pp. 151-154]

Administration of Justice Act, 1696, s. 8.

This provision, relating to replevin bonds, is essentially procedural. It has been held to be in force in Saskatchewan. It could be re-enacted as a provision of *The Queen's Bench Act*, or re-introduced into Saskatchewan law as a Rule of Court. [See pp. 280-281]

Posthumous Children Act, 1698.

This is a provision of limited application, but created a well-established rule of real property law. A similar provision, in modern language, was re-enacted in Ontario as s. 46 of the *Conveyancing and Law of Property Act*, R.S.O. 1980, c. 85. It could be enacted in Saskatchewan in an "English Statutes Re-enactment Act", or a "Real Property (Miscellaneous Provisions) Act". [See p. 84]

Administration of Justice Act, 1705, s. 27.

This statute created the well-established right of co-tenants to demand an accounting. It has been held to be in force in Saskatchewan. It could be re-enacted in an "English Statutes Re-enactment Act", or a "Real Property (Miscellaneous Provisions) Act". [See pp. 76-77]

***Landlord and Tenant Act*, 1709, s. 4.**

This is one of the few provisions of English landlord and tenant law not reproduced in the Saskatchewan *Landlord and Tenant Act* that remains of practical significance. It should be re-enacted as a provision of *The Landlord and Tenant Act*. [See p. 94]

Gaming Act, 1710.

See *Gaming Act*, 1845.

Distress for Rents Act, 1737, s. 15.

See *Apportionment Act*, 1834.

***Laws Continuance Act*, 1739-40, s. 68.**

This provision placed a six month limitation on applications for *certiorari* to challenge proceedings before a "justice or justices of the peace". It was treated as in force in Saskatchewan in *obiter* comments in a recent Court of Appeal decision. In the same decision, rule 675(2) of the Rules of the Court of Queen's Bench, which may have been derived from the statute, was held to be invalid. Because of the narrow scope of the statute, there is little point in retaining it as part of the law of Saskatchewan. However, consideration should be given to adoption of a general six month limitation on *certiorari* applications in order to preserve the policy of rule 675(2). [See pp. 243-245]

PROPOSALS

Fires Prevention (Metropolis) Act, 1774, c. 86.

This provision, which has been held to be in force in Saskatchewan, reverses the common law rule that an accidental fire is presumed to be caused by the occupier of a building. It is a useful provision, but there is no obvious place to re-enact it. It might be included in an "English Statutes Re-enactment Act". Alternatively, since it has usually been referred to in cases involving fire insurance, it might be included in the Saskatchewan *Insurance Act*. [See pp. 163-164]

Administration of Estates Act, 1798, ss. 6-7.

This provision provides the statutory foundation for rule 21(1)(d) of the Rules of Surrogate Court requiring a petitioner to affirm that he is of the full age of 18 years. The English provision could be disposed of by enacting a substantive requirement in *The Surrogate Court Act* that a petitioner for probate be of full age. [See pp. 109-112]

Accumulations Act, 1800.

This legislation has been found to be in force in Saskatchewan. It could be re-enacted as a Saskatchewan *Act*. It has been repealed, however, in Alberta, Manitoba and British Columbia. The Law Reform Commission of Saskatchewan recommended repeal of the legislation in this province in its report on perpetuities and accumulations. This recommendation could be implemented in the legislation disposing of English statutes. [See pp. 133-134]

***Habeas Corpus Act*, 1816, ss. 3-4.**

This is the only English statute relating to prerogative writs that can be said unequivocally to be in force. It reverses (in civil cases) the common law rule that facts deposed by the jailor upon the return of the writ can not be impeached. It should be retained as part of provincial law. Although some provinces have enacted *Habeas Corpus Acts* including a similar provision (see, for example, R.S.O. 1980, c. 193, ss. 3-4), it would probably be more convenient to re-incorporate this provision in provincial law in an "English Statutes Re-enactment Act", or in the *Queen's Bench Act.* [See pp. 233-234]

Illusory Appointments Act, 1830

This *Act* confirms a strict construction of powers of appointment, superseding the approach formerly favoured in equity. Although it is unlikely to be of much practical significance, it should be retained as part of the law of Saskatchewan. It could be re-enacted in an "English Statutes Re-enactment Act", or included as a provision of the provincial *Trustees Act.* [See p. 135]

***Apportionment Act*, 1834.**

This *Act*, and The *Distress for Rents Act*, 1837, s. 15, established rules for apportionment of rent in certain circumstances when a tenancy is prematurely terminated. Broader apportionment legislation, *The*

Apportionment Act, 1870 was adopted just after reception date. Most provinces have adopted apportionment legislation based on the 1870 *Act*. See for example, *The Apportionment Act*, R.S.O. 1980, c. 23. The received law could be re-enacted in the provincial *Landlord and Tenant Act*, but consideration might also be given to adoption of modern apportionment legislation based on the 1870 English *Act*, or its Canadian counterparts. [See pp. 93-94]

***Gaming Act*, 1835.**

See *Gaming Act*, 1845.

***Gaming Act*, 1845, s. 18.**

This provision, together with *The Gaming Act*, 1835 and *The Gaming Act*, 1710 (as amended by the later *Acts*) have been held to be in force in Saskatchewan. They apply to aspects of gambling not encompassed in the Criminal Code. These *Acts* should be re-enacted as a Saskatchewan "Gaming Act". The Ontario *Gaming Act*, R.S.O. 1980, c. 183 is a consolidation of the English statutes, but differs from the received law in force in Saskatchewan in that it retains a provision from the 1710 *Act* that was repealed in England in 1845. [See 204-208]

The Land Clauses Consolidation Act, 1845

This *Act* provided general rules for determining compensation when land was expropriated pursuant to other statutes. Although it is almost certainly not in force in Saskatchewan, the perhaps peculiar interpretation placed on the *Act* by English Courts has been applied to Canadian expropriation legislation. Unfortunately, the Saskatchewan *Expropriation Procedure Act* did not succeed in making recourse to the English authorities under the 1845 *Act* unnecessary in cases of "injurious affection" to land when expropriation occurs. Consideration should be given to adoption of a comprehensive formula in regard to injurious affection. Such a provision could be enacted in *The Expropriation Procedure Act*. [See pp. 278-285]

Interpretation Act, 1850.

This statute was the source from which most of the provisions of the Saskatchewan *Interpretation Act* were drawn. It may remain useful to the extent that it extends the rules of statutory interpretation contained in the provincial *Act* to received statutes. This effect could be retained by amending the provincial *Interpretation Act* to clearly make it applicable to received statutes if all received statutes are not re-enacted or repealed. In the event that all English law is disposed of, however, no amendment to the provincial legislation would be necessary. [See pp. 283-284]

An Act to Amend the Evidence Act, 1851, s. 7.

The rule of evidence established by this section, providing for admission of certified copies of foreign governmental and judicial documents, was left out of the consolidation of English evidence law in the Saskatchewan *Evidence Act*. It should be re-enacted as a provision of the Saskatchewan *Evidence Act*. [See pp. 185-186]

Landlord and Tenant Act, 1851, s. 3.

Although this provision has not been found to be in force in Saskatchewan, it is likely part of the received law and potentially significant. It provides that fixtures placed on land used for agricultural purposes by a tenant remain the property of the tenant. This provision should be re-enacted in the provincial *Landlord and Tenant Act*. [See pp. 94-96]

Common Law Procedure Act, 1854, s. 26.

This section reversed the common law rule requiring proof of documents attested by witnesses by calling a witness, even when the document was one that did not have to be attested. It should be re-enacted as a provision of the Saskatchewan *Evidence Act*. [See pp. 190-191]

***Mercantile Law Amendment Act*, 1856, ss. 3 and 5.**

Both these provisions relate to guarantees of loans. They remain an essential part of the law of Saskatchewan, and could be re-enacted in an "English Statutes Re-enactment Act", or as a provincial "Guarantees Act". [See pp. 154-158]

***Court of Probate Act*, 1858, s. 16**

This provision, held to be in force in Saskatchewan, fills a gap in Saskatchewan's Surrogate Court procedure. It should be re-enacted as a provision of *The Surrogate Court Act*. [See pp. 112-116]

***Law of Property Amendment Act*, 1859, s. 12.**

This provision permits a power of appointment to be exercised in a manner other than that specified in the document creating it. The Saskatchewan *Wills Act* contains a similar provision, but it applies only to powers created by will. The 1859 provision should be retained, and could be re-enacted in an "English statutes Re-enactment Act", or as a provision of the provincial *Trustee Act*. [See pp. 134-135]

***Solicitors Act*, 1860, s. 28.**

This provision, which has been held to be in force in Saskatchewan, relates to solicitors' liens for fees. It should be re-enacted as a provision of the Saskatchewan *Legal Professions Act*. [See pp. 263-264]

***Sale of Reversions Act*, 1867.**

Although this provision is of very limited application, it appears to remain part of our law. It could be re-enacted in an "English Statutes Re-enactment Act", or "Real Property (Miscellaneous Provisions) Act". [See p. 85]

***Sale of Land by Auction Act*, 1867.**

This *Act* has been held to be in force in Saskatchewan, and continues to govern sale of land by auction. It should be re-enacted as a Saskatchewan statute. [See pp. 80-81]

***Partition Act*, 1868.**

This legislation still provides for partition and sale of lands held in co-tenancy in Saskatchewan. It assumes the existence of earlier legislation, the *Statutes of Partition*, 1539 and 1540. The older statutes provide the statutory basis for partition; the 1868 statute gives the court discretion to order sale instead of physical partition. Several provinces have enacted statutes of partition that combine the substance of the 1539, 1540 and 1868 statutes. See for example the Ontario *Partition Act*, R.S.O., 1980, c. 369. The English statute could be disposed of by enacting a similar Saskatchewan statute. [See pp. 74-77]

***Evidence Further Amendment Act*, 1869, s. 3.**

This provision, providing that a witness is not compellable to give evidence tending to show adultery, is probably in force in Saskatchewan. It conflicts, however, with rules 495, 617 and 641 of the Rules of the Court of Queen's Bench. Therefore, the validity of those rules is in question. This problem could be resolved in favour of the policy contained in the Rules of Court by re-enacting the substance of the rules as a provision of the Saskatchewan *Evidence Act*. [See pp. 186-190]

***Forfeiture Act*, 1870.**

The status of this legislation is uncertain. Although the Criminal Code abolished forfeiture, there is some Canadian authority suggesting that forfeiture is a matter within provincial rather than federal jurisdiction. If that is the case, The *Forfeiture Act* remains in force. The *Act* abolishes forfeiture, but places certain offenders under a disability in regard to disposition of property during imprisonment. If any part of The *Forfeiture Act* is retained, the retention should do no more than confirm the attempted abolition of forfeiture. Essentially as a precautionary measure, s. 1 of the English *Act* (which abolished forfeiture) could be re-enacted in an "English Statutes Re-enactment Act", or in the *Queen's Bench Act*. [See pp. 200-204]

Solicitors Act, 1870.

This *Act* expressly permitted solicitors to enter into contracts for fees, but expressly prohibited contingency fees. Contracts for fees are presently permitted in Saskatchewan on the basis of judicial decisions that do not refer to the 1870 legislation. Contingency fees have also been accepted by the Saskatchewan courts. Nevertheless, it cannot be said with certainty that the statute is not in force in Saskatchewan. It would not be desirable to retain the 1870 legislation in Saskatchewan. However, provisions of the 1870 *Act* (except those prohibiting contingency fees) reflect the general Canadian practice in regard to solicitors' fees. It may be desirable to incorporate part of the 1870 *Act* into the Saskatchewan *Legal Professions Act*. The *British Columbia Barristers and Solicitors Act*, R.S.B.C. 1979, c. 26 provides a model for incorporation of the 1870 *Act* into traditional legal professions legislation. The British Columbia *Act* expressly permits contingency fees. [See pp. 265-268]

THE STATUS OF ENGLISH STATUTE LAW

CONSTITUTIONAL STATUTES

The statutes discussed in Chapter 10 of Part II under the heading "Constitutional Statutes" should be treated in a different manner than other received law. Most of the statutes in this category overlap federal and provincial jurisdiction, and many of them have been superseded in large part by provincial legislation. Nevertheless, it is appropriate to retain these landmarks in the evolution of the English constitution as part of Saskatchewan law to the extent that they are relevant to matters within provincial jurisdiction.

Because the statutes in this category are primarily of historical interest, no good purpose would be served by re-enacting them as provincial statutes, or attempting to determine the extent to which they remain relevant in practice. Instead, these statutes should be declared to remain in force to the extent that they relate to matters within provincial jurisdiction, and are applicable to the province.

Magna Carta, 1297, c. 29

Statutes of 5 Edw. 3, c. 9; *25 Edw. 3, stat. 5*, c. 4; *28 Edw. 3*, c. 3; *42 Edw. 3*, c. 3

Statute of Marlbridge, c. 1

Petition of Rights, 1627

Bill of Rights, 1688

Toleration Act, 1689

PROPOSALS

Act of Settlement, 1700

Royal Marriages Act, 1772

Roman Catholic Emancipation Act, 1829

Act Abolishing Slavery, 1833

Accession Declaration Act, 1910

TABLE OF ENGLISH STATUTES

1225	*Magna Carta*, 9 Hen. (Ruff.) .. 7, 56
1235	*Statute of Merton*, 20 Hen. 3 .. 7
1267	*Statute of Marlbridge (Statute of Marlborough)*, 52 Hen. 3 .. 88, 91-93, 214, 257, 271, 299, 314
1274	*Statute of Westminister Primus*, 3 Edw. 1 .. 171
1278	*Statute of Gloucester*, 6 Edw. 1 .. 52, 223, 238
1279	*Statute of Mortmain*, 7 Edw. 1. Stat. de Viris Relig. .. 42, 50
1283	*Statute of Acton Burnell* .. 138
1285	*Carta Mercatoria*, 13 Edw. 1 (Stat. Merc.) .. 138
1285	*Statute of Westminster Secundus*, 13 Edw. 1, Stat. 1 .. 116, 141, 161
1285	*De donis conditionalibus (Stat. Westm. Sec., c. 1)*, 13 Edw. 1, c. 1 .. 51-52
1290	*Statute of Quo Warranto*, 18 Edw. 1, Stats. 1 and 2 .. 238
1290	*Statute modus levandi fines*, 18 Edw. 1. Stat. 4 (Ruff.) .. 68
1290	*Quia emptores terrarum*, 18 Edw. 1. Stat. d'ni R. de t'ris .. 51, 55-56, 297, 299
1297	*Magna Carta*, 25 Edw. 1, c. 29 .. 269-270, 314
1300	(Maintenance and Champerty), 28 Edw. 1, Artic. Sup. Cart., c. 11 .. 171
1305	*Ordin. De Conspiracy*, 33 Edw. 1 .. 171
1324	*De Prerogativa Regis*, 17 Edw. 2, Stat. 1, c. 1-18 (Ruff.) .. 257, 288-289
1326-27	(Maintenance and Champerty), 1 Edw. 3, Stat. 2, c. 14 .. 171
1326-27	*Justices of the Peace Act*, 1 Edw. 3, Stat. 2, c. 16 .. 197

1331	(Imprisonment etc.), 5 Edw. 3, c. 9 .. 270, 314
1344	*Justices of the Peace Act*, 18 Edw. 3, Stat. 2, c. 2 .. 197
1351-52	(Imprisonment etc.), 25 Edw. 3, Stat. 5, c. 4 .. 270, 314
1351-52	(Administration of Estates), 25 Edw. 3, Stat. 5, c. 5 .. 117, 161
1353	*Statute of Staples*, 27 Edw. 3, Stat. 2 .. 138
1354	(Imprisonment etc.), 28 Edw. 3, c. 3 .. 270, 314
1357	*Intestate Estates Administration Act*, 31 Edw. 3, Stat. 1, c. 11 .. 121-123, 300
1360	*Justices of the Peace Act*, 34 Edw. 3, c. 1 .. 197-200
1368	(Imprisonment etc.), 42 Edw. 3, c. 3 .. 270, 314
1377	(Maintenance and Champerty), 1 Ric. 2, c. 4 .. 171
1381	*Statute of Forcible Entry*, 5 Ric. 2, Stat. 1, c. 7 .. 194-196
1391	*Statute of Mortmain*, 15 Ric. 2, c. 5 .. 50
1400-1	(Non-suit), 2 Hen. 4, c. 7 .. 216
1429	*Statute of Forcible Entry*, 8 Hen. 6, c. 9 .. 194-196
1488-89	(Fines), 4 Hen. 7, c. 24 .. 68
1495	*Suing in Forma Pauperis*, 11 Hen. 7, c. 12 .. 226-228
1529	(Administration of Estates), 21 Hen. 8, c. 4 .. 117
1529	*Probate Fees Act*, 21 Hen. 8, c. 5 .. 121-123, 300
1531	*Suing in Forma Pauperis Act*, 23 Hen. 8, c. 15 .. 226-228
1535	*Statute of Uses*, 27 Hen. 8, c. 10 .. 56-62, 70, 101, 124, 300-301
1535	*Statute of Enrolments*, 27 Hen. 8, c. 16 .. 60, 81-83, 146
1536	(Marriage), 28 Hen. 8, c. 7 .. 261

1539	*Statute of Partition*, 31 Hen. 8, c. 1 .. 74-77, 301
1540	*Statute of Maintenance*, 32 Hen. 8, c. 9 .. 81-83, 170-174
1540	*Grantees of Reversions*, 32 Hen. 8, c. 34 .. 89, 90
1540	(Marriage), 32 Hen. 8, c. 38 .. 261
1540	*Statute of Wills*, 32 Hen. 8, c. 1 .. 102
1540	*Statute of Partition*, 32 Hen. 8, c. 32 .. 74-77, 301
1540	(Fines), 32 Hen. 8, c. 36 .. 68
1541-42	(Bonds etc.), 33 Hen. 8, c. 39 .. 42
1541-42	(Gambling), 33 Hen. 8, c. 9 .. 205
1542	*Statute of Wills*, 34 and 35 Hen. 8, c. 5 .. 102
1542	*Physicians and Surgeons Act*, 34 and 35 Hen. 8, c. 8 .. 263
1552	*Sale of Offices Act*, 5 and 6 Edw. 6, c. 15 .. 210
1552	*Holidays Act*, 5 and 6 Edw. 6, c. 3 .. 208
1557-58	(Abduction of Children), 4 and 5 Ph. and M., c. 8 .. 257
1558-59	*Act of Supremacy*, 1 Eliz. 1, c. 1 .. 261
1570	*Fraudulent Conveyances Act*, 13 Eliz. 1, c. 5 .. 139, 146-151, 296, 301
1571	(Crown Lands and Crown Debt), 31 Eliz. 1, c. 4 .. 42
1572	(Recoveries), 14 Eliz. 1, c. 8 .. 68
1585	*Fraudulent Conveyances Act*, 27 Eliz. 1, c. 4 .. 82-84, 146
1588	*Statute of Forcible Entry*, 31 Eliz. 1, c. 11 .. 194-196
1601	*Poor Relief Act*, 43 Eliz. 1, c. 2 .. 258
1601	*Charities Act*, 43 Eliz. 1, c. 4 .. 131, 301
1601	(Frivolous Suits), 43 Eliz. 1, c. 6 .. 223
1601	(Administration of Estates), 43 Eliz. 1, c. 8 .. 119, 302

1609	*Public Officers Act*, 7 Jac. 1, c. 5 .. 165
1609-10	(Intrusion, Scire Facias), 21 Jac. 1, c. 14 .. 250
1623	*Statute of Limitations*, 21 Jac. 1, c. 16 .. 57, 247-248
1623	*Statute of Monopolies*, 21 Jac., c. 3 .. 250
1625	*Sunday Observance Act*, 1 Cha. 1, c. 1 .. 208
1627	*Petition of Right*, 3 Cha. 1, c. 1 .. 271, 314
1640	*Act for Regulating of the Privy Council (Star Chamber Abolition)*, 16 Cha. 1, c. 10 .. 233
1660	*Tenures Abolition Act (Statute of Tenures)*, 12 Cha. 2, c. 24 .. 62-63, 257
1660	*Navigation Act*, 12 Cha. 2, c. 18 .. 139
1664	*Act Against Deceitful, Disorderly and Excessive Gambling*, 16 Cha. 2, c. 7 .. 205
1665	(Death Between Verdict and Judgment), 17 Cha. 2, c. 8 .. 118
1666	*Cestui Que Vie Act*, 18 and 19 Cha. 2, c. 11 .. 83
1670	*Statute of Distribution*, 22 and 23 Cha. 2, c. 10 .. 105-106
1677	*Statute of Frauds*, 29 Cha. 2, c. 3 .. 4, 71, 102, 121, 139, 151-154, 296, 297, 298, 302
1677	*Sunday Observance Act*, 29 Cha. 2, c. 7 .. 208-209
1678	(Administration of Estates), 30 Cha. 2, Stat. 1, c. 7 .. 119
1679	*Habeas Corpus Act*, 31 Cha. 2, c. 2 .. 232
1684	*Statute of Distribution*, 29 Cha. 2, c. 3 .. 105
1685	*Statute of Distribution*, 1 Jac. 2, c. 17 .. 105
1688	*Bill of Rights*, 1 Will. and Mar., Sess. 2, c. 2 .. 271, 314
1689	*Toleration Act*, 1 Will. and Mar., c. 18 .. 271-272, 314
1689	*Distress for Rents Act*, 2 Will. and Mar., c. 5 .. 88, 90

1692	*King's Bench Act*, 4 and 5 Will. and Mar., c. 18 .. 238
1692	(Administration of Estates), 4 Will. and Mar., c. 24 .. 119
1692	*Clandestine Mortgages*, 4 Will. and Mar., c. 16 .. 82
1695-96	*Statute of Mortmain*, 7 and 8 Will. 3, c. 37 .. 50
1696	*Administration of Justice Act*, 8 and 9 Will. 3, c. 11 .. 215, 223, 225, 287, 303
1698	*Arbitration Act*, 9 and 10 Will. 3, c. 14 .. 216
1698	*Posthumous Children Act*, 10 Will. 3, c. 22 .. 84, 303
1700	*Act of Settlement*, 12 and 13 Will. 3, c. 2 .. 272, 315
1705	*Administration of Justice Act (Statute of Anne)*, 4 and 5 Ann., c. 3 .. 76-77, 89, 215, 303
1707	*Cestui Que Vie Act*, 6 Ann., c. 72 .. 83
1709	*Landlord and Tenant Act*, 8 Ann., c. 18 .. 89, 94, 304
1710	*Municipal Offices Act*, 9 Ann., c. 20 .. 234-237, 239-241
1710	*Gaming Act*, 1710, 9 Ann., c. 9 .. 205-208, 304
1720	*Trade to the East Indies Act*, 7 Geo. 1, Stat. 1, c. 21 .. 138
1720	*South Sea Bubble Act*, 6 Geo. 1, c. 18 .. 250
1724	(London--Wills etc.), 11 Geo. 1, c. 18 .. 101
1728	*Statute of Set-off*, 2 Geo. 2, c. 22 .. 218-219, 221-223
1730	*Landlord and Tenant Act*, 4 Geo., c. 28 .. 89
1732	(Recovery of Debts in America), 5 Geo. 2, c. 7 .. 141
1733	*Mortgage Act*, 7 Geo. 2, c. 20 .. 52
1735	*Charitable Uses Act*, 9 Geo. 2, c. 36 .. 50
1735	*Statute of Set-off*, 8 Geo. 2, c. 24 .. 218-219, 221-222

1737	*Distress for Rents Act*, 11 Geo. 2, c. 19 .. 88, 90, 93-94, 304
1739-40	*Laws Continuance Act*, 13 Geo. 2, c. 18 .. 242, 243-254, 304
1740-41	(Non-suit), 14 Geo. 2, c. 17 .. 216
1742	*Marriage of Lunatics Act*, 15 Geo. 2, c. 30 .. 261-262
1750	*Constables Protection Act*, 24 Geo. 2, c. 44 .. 164-166
1750	*Calendar (New Style) Act*, 24 Geo. 2, c. 23 .. 273-274
1753	*Marriage Act (Lord Hardwicke's Act)*, 26 Geo. 2, c. 33 .. 260
1758	(*Lord's Act*), 32 Geo. 2, c. 28 .. 141
1769	*Crown Suits Act (Nullum Tempus Act)*, 9 Geo. 3, c. 16 .. 249
1772	*Royal Marriages Act*, 12 Geo. 3, c. 11 .. 272, 315
1774	*Quebec Act*, 14 Geo. 3, c. 83 .. 18, 26
1774	*Life Assurance Act*, 14 Geo. 3, c. 48 .. 285-287
1774	*Fires Prevention (Metropolis) Act*, 14 Geo. 3, c. 78 .. 163-164, 296, 305
1779	*Inferior Courts Act*, 19 Geo. 3, c. 70 .. 242
1780-81	(Sunday), 21 Geo. 3, c. 49 .. 208
1792	*Libel Act (Fox's Libel Act)*, 32 Geo. 3, c. 60 .. 161
1797	*Trade to the East Indies Act*, 37 Geo. 3, c. 117 .. 139
1798	*Administration of Estates Act*, 38 Geo. 3, c. 87 .. 107, 109-112, 296, 305
1800	*Accumulations Act*, 39 and 40 Geo. 3, c. 98 .. 132-133, 305
1802-3	*Habeas Corpus Act*, 43 Geo. 3, c. 140 .. 232
1803-4	*Habeas Corpus Act*, 44 Geo. 3, c. 102 .. 232
1806	*Witnesses Act*, 46 Geo. 3, c. 37 .. 182
1809	*Sale of Offices Act*, 49 Geo. 3, c. 126 .. 210-211

1811	*Marriage of Lunatics Act*, 51 Geo. 3, c. 37 .. 261-262
1813-14	(Poor Laws), 54 Geo. 3, c. 170 .. 178
1816	*Habeas Corpus Act*, 56 Geo. 3, c. 100 .. 231, 233, 234, 306
1817	*Deserted Tenaments Act*, 57 Geo. 3, c. 52 .. 90
1821	(Hudson's Bay Company), 1 and 2 Geo. 4, c. 66 .. 20
1823	*Factors Act*, 4 Geo. 4, c. 83 .. 144
1823	*Marriage Act*, 4 Geo. 4, c. 76 .. 260
1825	*Factors Act*, 6 Geo. 4, c. 94 .. 144
1825	(Bubble Act Repeal), 6 Geo. 4, c. 91 .. 250
1828	*Civil Rights of Convicts Act*, 9 Geo. 4, c. 12 .. 178
1828	*Statute of Frauds Amendment Act (Lord Tenterden's Act)*, 9 Geo. 4, c. 14 .. 153-154, 248, 297, 302
1829	(Payment of Debt Out of Real Estate), 11 Geo. 4 and 1 Will. 4, c. 47 .. 104
1829	*Roman Catholic Emancipation Act*, 10 Geo. 4, c. 7 .. 272, 315
1830	*Illusory Appointments Act*, 11 Geo. 1 and 1 Will. 4, c. 46 .. 134-135, 306
1830	*Undisposed of Residues Act*, 11 Geo. 4 and 1 Will. 4, c. 40 .. 105-106
1830-31	*Habeas Corpus Act*, 1 Will. 4, c. 22 .. 232
1831	*Truck Act*, 1 and 2 Will. 4, c. 37 .. 276-278
1831	(Evidence etc.), 1 Will. 4, c. 22 .. 181
1832	*Prescription Act*, 2 and 3 Will. 4, c. 71 .. 52
1832	*Unification of Process Act*, 2 and 3 Will. 4, c. 33 .. 215
1833	(Administration of Estates), 3 and 4 Will. 4, c. 27 .. 118
1833	*Civil Procedure Act*, 3 and 4 Will. 4, c. 42 .. 161, 178, 215

1833	*Real Property Limitations Act*, 3 and 4 Will. 4, c. 27 .. 64, 66, 215, 247
1833	*Inheritance Act*, 3 and 4 Will. 4, c. 106 .. 104-105, 257
1833	*Fines and Recoveries Act*, 3 and 4 Will. 4, c. 74 .. 64, 68-69
1833	*Act Abolishing Slavery*, 3 and 4 Will. 4, c. 73 .. 272, 315
1833	*China and India Trade Act*, 3 and 4 Will. 4, c. 93 .. 139
1833	(Payment of Debt Out of Real Estate), 3 and 4 Will. 4, c. 104 .. 104
1833	*Sewers Act*, 3 and 4 Will. 4, c. 22 .. 279
1834	*Poor Law Amendment Act*, 4 and 5 Will. 4, c. 76 .. 259
1834	*Apportionment Act*, 4 and 5 Will. 4, c. 22 .. 89, 93-94, 306-307
1835	*Marriage Act (Lord Lyndhurst's Act)*, 5 and 6 Will. 4, c. 54 .. 261
1835	*Gaming Act*, 5 and 6 Will. 4, c. 41 .. 205-208, 307
1837	*Real Property Limitations Act*, 7 Will. 4 and 1 Vict., c. 28 .. 64, 247
1837	*Wills Act*, 7 Will. 4 and 1 Vict., c. 26 .. 102-103
1837	*Municipal Corporations (General) Act*, 7 Will. 4 and 1 Vict., c. 78 .. 240, 241, 243
1838	*Judgment Act*, 1 and 2 Vict., c. 110 .. 141, 142, 242
1839	*Custody of Infants Act*, 2 and 3 Vict., c. 54 .. 258
1840	(Libel), 3 and 4 Vict., c. 9 .. 162
1840	*Judgment Act*, 3 and 4 Vict., c. 82 .. 141, 142
1840	Church Discipline Act, 3 & 4 Vict., c. 86 .. 39
1842	(Limitation of Actions and Costs), 5 and 6 Vict., c. 97 .. 223-224

1842	*Habeas Corpus Act*, 4 and 6 Vict., c. 38 .. 232
1842	*Factors Act*, 5 and 6 Vict., c. 39 .. 144
1843	*Libel and Slander Act (Lord Campbell's Act)*, 6 and 7 Vict., c. 96 .. 160-162
1843	*Solicitors Act*, 6 and 7 Vict., c. 73 .. 263
1843	*Evidence Act (Lord Denman's Act)*, 6 and 7 Vict., c. 85 .. 178, 182
1844	*Joint Stock Companies Act*, 7 and 8 Vict., cc. 110 and 111 .. 250
1844	*Transfer of Property Act*, 7 and 8 Vict., c. 76 .. 73
1845	*Real Property Act*, 8 and 9 Vict., c. 106 .. 53, 64, 68, 69-74
1845	*Libel and Slander Act (Lord Campbell's Act)*, 8 and 9 Vict., c. 75 .. 160-162
1845	*Land Clauses Consolidation Act*, 8 and 9 Vict., c. 18 .. 236, 278-285, 308
1845	*Small Debts Act*, 8 and 9 Vict., c. 127 .. 141
1845	*Gaming Act*, 8 and 9 Vict., c. 109 .. 206-207, 307
1846	*Fatal Accidents Act (Lord Campbell's Act)*, 9 and 10 Vict., c. 93 .. 161-162
1847-48	(Sale of Beer etc. on Sunday), 11 and 12 Vict., c. 49 .. 208
1847	*Trustees Relief Act*, 10 and 11 Vict., c. 96 .. 126
1848	*Justices Protection Act*, 11 and 12 Vict., c. 44 .. 165, 235
1849	*Court of Quarter Sessions Act*, 12 and 13 Vict., c. 45 .. 242
1850	*Interpretation Act (Lord Brougham's Act)*, 13 and 14 Vict., c. 21 .. 290-291, 308
1850	(Fairs and Markets; Sunday), 13 and 14 Vict., c. 43 .. 208
1851	*Landlord and Tenant Act*, 14 and 15 Vict., c. 25 .. 89, 91, 94-96, 309

1851	*Act to Amend the Law of Evidence (Lord Brougham's Act)*, 14 and 15 Vict., c. 99 .. 179, 182-185, 186, 309
1852	*Chancery Procedure Amendment Act*, 15 and 16 Vict., c. 86 .. 78-79, 121, 216
1852	*Common Law Procedure Act*, 15 and 16 Vict., c. 76 .. 52, 66, 117, 216
1852	(Wills), 15 and 16 Vict., c. 24 .. 103
1852	*Lunacy Regulation Act*, 16 and 17 Vict., c. 70 .. 288
1853	*Evidence Amendment Act*, 16 and 17 Vict., c. 83 .. 179
1854	*Real Estate Charges Act (Locke King's Act)*, 17 and 18 Vict., c. 113 .. 46-49, 102-104
1854	*Common Law Procedure Act*, 17 and 18 Vict., c. 125 .. 141-143, 162, 180, 181, 182-183, 190-191, 234-236, 309
1854	*Bill of Sale Act*, 17 and 18 Vict., c. 36 .. 145
1855	*Bills of Lading Act*, 18 and 19 Vict., c. 111 .. 145-146, 156-157
1855	*Infant's Settlements Act*, 18 and 19 Vict., c. 43 .. 154
1855	*Crown Suits*, 18 and 19 Vict., c. 90 .. 226
1856	*Settled Estates Act*, 19 and 20 Vict., c. 120 .. 127, 129-131
1856	*Mercantile Law Amendment Act*, 19 and 20 Vict., c. 97 .. 145, 154-156, 248, 310
1856	*Coastguard and Service Act*, 19 & 20 Vict., c. 83 .. 279
1857	*Court of Probate Act*, 20 and 21 Vict., c. 77 .. 107, 108-109, 121, 191
1857	*Divorce and Matrimonial Causes Act*, 20 and 21 Vict., c. 85 .. 43, 252-256
1858	*Court of Probate Act*, 21 and 22 Vict., c. 95 .. 107, 112-116, 310

1858	*Settled Estates Act*, 21 and 22 Vict., c. 77 .. 127, 129
1858	*Chancery Procedure Amendment Act*, 21 and 22 Vict., c. 27 .. 216
1859	*Evidence on Commission Act*, 22 Vict., c. 20 .. 181, 184
1859	*Law of Property Amendment Act*, 22 and 23 Vict., c. 35 .. 89, 126, 134, 310
1859	*Court Procedure Act*, 12 and 13 Vict., c. 45 .. 216
1859	*Dominions Laws Ascertainment Act*, 22 and 23 Vict., c. 63 .. 274-276
1859	(British Columbia), 22 and 23 Vict., c. 26 .. 20
1860	*Solicitors Act*, 23 and 24 Vict., c. 127 .. 263-264, 310
1860	*Land Clauses Consolidation Act*, 23 and 24 Vict., c. 106 .. 64
1860	*Common Law Procedure Act*, 23 and 24 Vict., c. 126 .. 66, 216
1860	*Law of Property Amendment Act*, 23 and 24 Vict., c. 38 .. 64, 89, 247, 248
1860	*Trustee Act*, 23 and 24 Vict., c. 145 .. 126, 128-129
1861	*Statute Law Revision Act*, 24 and 25 Vict., c. 101 .. 44
1861	*Foreign Laws Ascertainment Act*, 24 Vict., c. 11 .. 274-276
1861	*Wills Act Amendment Act*, 24 and 25 Vict., c. 114 .. 102
1861	*Crown Suits Act*, 24 and 25 Vict., c. 62 .. 249
1861	*Offences Against the Person Act*, 24 and 25 Vict., c. 100 .. 5, 167-170
1862	*Companies Act*, 25 and 26 Vict., c. 89 .. 251
1862	*Registration Act (Lord Westbury's Act)*, 25 and 26 Vict., c. 53 .. 64
1863	*Statute Law Revision Act*, 26 and 27 Vict., c. 125 .. 44, 82, 238, 257
1863	*Companies Clauses Act*, 26 and 27 Vict., c. 118 .. 251

1864	*Fatal Accidents Act*, 27 and 28 Vict., c. 95 .. 161-162
1864	*Settled Estates Act*, 27 and 28 Vict., c. 114 .. 127, 129
1865	*Navy and Marines (Wills) Act*, 28 and 29 Vict., c. 72 .. 102, 104
1865	*Dogs Act*, 28 and 29 Vict., c. 60 .. 162
1867	*Statute Law Revision Act*, 30 and 31 Vict., c. 59 .. 44, 141
1867	*British North America Act*, 30 and 31 Vict., c. 3 .. 30, 32
1867	*Companies Act*, 30 and 31 Vict., c. 118 .. 251
1867	*Real Estate Charges Amendment Act*, 30 and 31 Vict., c. 69 .. 46-49, 102
1867	*Sales of Reversions Act*, 31 and 32 Vict., c. 4 .. 85, 303
1867	*Sale of Land by Auctions Act*, 30 and 31 Vict., c. 48 .. 80-81, 296, 311
1867	*Court of Chancery (Officers) Act*, 30 and 31 Vict., c. 87 .. 288
1868	*Documentary Evidence Act*, 31 and 32 Vict., c. 37 .. 179, 183
1868	*Partition Act*, 31 and 32 Vict., c. 40 .. 4, 51, 74-76, 296, 311
1869	*Bankruptcy Act*, 32 and 33 Vict., c. 71 .. 148
1869	*Evidence Further Amendment Act*, 32 and 33 Vict., c. 68 .. 6, 179, 181, 183, 186-190, 312
1869	*Debtors Act*, 32 and 33 Vict., c. 62 .. 39, 141, 142
1870	*Solicitors Act*, 33 and 34 Vict., c. 28 .. 4, 265-268, 313
1870	*Extradition Act*, 33 and 34 Vict., c. 52 .. 35
1870	*Wages Attachment Abolition Act*, 33 and 34 Vict., c. 30 .. 24, 141
1870	(Consolidated Fund), 33 and 34 Vict., c. 31 .. 24
1870	*Foreign Enlistment Act*, 33 and 34 Vict., c. 90 .. 35

1870	*Married Women's Property Act*, 33 and 34 Vict., c. 93 .. 255
1870	*Forfeiture Act*, 33 and 34 Vict., c. 23 .. 200-204, 312-313
1870	*Absconding Debtors Act*, 33 and 34 Vict., c. 76 .. 141
1870	*Statute Law Revision Act*, 33 and 34 Vict., c. 69 .. 44
1871	*Statute Law Revision Act*, 34 and 35 Vict., c. 116 .. 44
1873	*Statute Law Revision Act*, 36 and 37 Vict., c. 91 .. 44
1873	*Custody of Infants Act*, 36 and 37 Vict., c. 12 .. 258
1873	*Extradition Act*, 36 and 37 Vict., c. 60 .. 35
1873	*Judicature Act*, 36 and 37 Vict., c. 66 .. 52, 53, 145, 216-217, 219, 223, 236
1874	*Powers of Appointment Act (Lord Selborne's Act)*, 37 and 38 Vict., c. 37 .. 134
1874	*Infant's Relief Act*, 37 and 38 Vict., c. 52 .. 154
1874	*Statute Law Revision Act*, 37 and 38 Vict., c. 35 .. 44
1875	*Statute Law Revision Act*, 38 and 39 Vict., c. 66 .. 44
1877	*Real Estate Charges Amendment Act*, 40 and 41 Vict., c. 34 .. 46-49
1877	*Factors Act*, 40 and 41 Vict., c. 39 .. 144
1878	*Statute Law Revision Act*, 41 and 42 Vict., c. 79 .. 44
1879	*Civil Procedure Repeal Act*, 42 and 43 Vict., c. 59 .. 225
1881	*Fugitive Offenders Act*, 44 and 45 Vict., c. 69 .. 35
1882	*Settled Estates Act*, 45 and 46 Vict., c. 38 .. 127
1882	*Bills of Exchange Act*, 45 and 46 Vict., c. 61 .. 144
1883	*Law Revision and Civil Procedure Act*, 46 and 47 Vict., c. 49 .. 219
1883	*Statute Law Revision Act*, 46 and 47 Vict., c. 39 .. 44, 236

1885	*Evidence on Commission Act*, 48 and 49 Vict., c. 74 .. 181, 184
1886	*Guardianship of Infants Act*, 49 and 50 Vict., c. 77 .. 258
1887	*Statute Law Revision Act*, 50 and 51 Vict., c. 59 .. 44, 141
1888	*Mortmain and Charitable Uses Act*, 51 and 52 Vict., c. 24 .. 50
1888	*Statute Law Revision Act*, 51 and 52 Vict., c. 57 .. 44
1889	*Factors Act*, 52 and 53 Vict., c. 45 .. 144
1889	*Official Secrets Act*, 52 and 53 Vict., c. 52 .. 35
1890	*Statute Law Revision Act*, 53 and 54 Vict., c. 51 .. 44
1890	*Judicature Act*, 53 and 54 Vict., c. 44 .. 224
1890	*Lunacy Act*, 53 and 54 Vict., c. 31 .. 288
1891	*Statute Law Revision Act*, 54 and 55 Vict., c. 67 .. 44
1892	*Statute Law Revision Act*, 55 and 56 Vict., c. 19 .. 44
1892	*Colonial Probate Act*, 55 and 56 Vict., c. 6 .. 123-124
1892	*Sale of Goods Act*, 56 and 57 Vict., c. 71 .. 143-144
1893	*Statute Law Revision Act*, 56 and 57 Vict., c. 14 .. 44
1893	*Trustee Act*, 56 and 57 Vict., c. 53 .. 6, 126, 127, 128-129
1895	*Extradition Act*, 58 and 59 Vict., c. 33 .. 35
1897	*Land Transfer Act*, 60 and 61 Vict., c. 65 .. 64
1906	*Extradition Act*, 6 Edw. 7, c. 15 .. 35
1910	*Accession Declaration Act*, 10 Edw. 7 and 1 Geo. 5, c. 29 .. 273, 315
1914	*Bankruptcy Act*, 4 and 5 Geo. 5, c. 59 .. 35
1925	*Law of Property Act*, 15 and 16 Geo. 5, c. 20 .. 134
1927	*Colonial Probates (Protected States and Mandated Territories) Act*, 17 and 18 Geo. 5, c. 43 .. 123

1928	*Easter Act*, 18 and 19 Geo. 5, c. 35 .. 274
1931	*Statute of Westminster*, 22 Geo. 5 .. 2, 30, 32-35
1948	*Statute Law Revision Act*, 11 and 12 Geo. 6, c. 62 .. 225
1982	*Canada Act*, 30 Eliz. 2, c. 11 .. 32